Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LOUIS DALE MARCANTEL, Individually and in his Official Capacity as Chief of Police of the Village of Turkey Creek,

Petitioner,

v.

MICHELL B. DEVILLE and RICKY DEVILLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, at the time of the petitioner's, Chief Louis Dale Marcantel, actions, the law was "clearly established" when neither this Court, nor any Federal Circuit Court of Appeal, including the Federal Fifth Circuit Court of Appeal, had ruled the Fourth Amendment is violated when a law enforcement officer uses force to break a driver's side window of a vehicle to extract the suspect driver pursuant to both state law and *Pennsylvania* v. *Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) to effectuate a custodial arrest of a suspect for speeding, who, when stopped, refused to sign or accept a citation.

2. If the law on this type of use of force was "clearly established," then whether the petitioner is entitled to qualified immunity for his use of force to compel a non compliant driver to exit the vehicle on a traffic stop and whether the split-second decision to effectuate a lawful custodial arrest by breaking the driver's side window of the suspect's locked and running vehicle to extract her pursuant to *Mimms* and state law, is objectively reasonable.

3. Whether the use of force by petitioner to compel a non compliant driver to exit the vehicle to effectuate a custodial arrest of the driver was excessive under Louisiana state law, in light of the dictates of Louisiana Code of Criminal Procedure Articles 220 and 224.

PARTIES TO THE PROCEEDING

Dwayne Tarver and the Village of Turkey Creek, defendants below, are being served as respondents herein.

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La. R.S. 32:391 5

Petitioner Louis Dale Marcantel, Chief of Police for the Village of Turkey Creek, Louisiana, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported as *Deville v. Marcantel*, 567 F.3d 156 (5th Cir. 2009). It is reproduced in the Appendix at 1a. The opinions of the District Court are unreported and reproduced in the Appendix at 33a and 40a.

JURISDICTION

On May 1, 2009, the Court of Appeal for the Fifth Circuit entered judgment. Chief Marcantel timely filed a petition for rehearing *en banc* on May 14, 2009. The Fifth Circuit entered an order denying the *en banc* petition on October 9, 2009. (Appendix at 74a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The only claims remaining by respondents against petitioner are alleged excessive force under federal and state law for the force used by Chief Marcantel during plaintiff's August 5, 2005 arrest.

RELEVANT PROVISIONS INVOLVED

Respondents, Michelle Deville and Ricky Deville, seek damages for alleged violations of her Fourth Amendment rights pursuant to 42 U.S.C. § 1983. The Fourth Amendment to the United States Constitution provides that "[t]he right of people to be secure in their

persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . ." The Devilles also make claims for excessive force under Louisiana state law.

STATEMENT

This is a case where the United States Court of Appeal for the Fifth Circuit clearly made the wrong decision. The Fifth Circuit ignored and did not apply this Honorable Court's qualified immunity rulings. Further, this is a case of first impression for this Court involving the application and/or possible extension of this Court's ruling in *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) as to the legal and constitutional amount of force an officer can use to compel a non compliant suspect out of a vehicle during a traffic stop. The Fifth Circuit's decision *effectively overrules Mimms* by prohibiting law enforcement officers from compelling a non compliant driver out of a vehicle during a traffic stop, and gives control of the road-side situation of a traffic stop to the suspect, which is contrary to this Court's prior pronouncements in *Mimms, supra* and *Maryland vs. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997), both which allow officers to compel drivers and passengers out of a vehicle. Traffic stops are "especially fraught with danger to police officers." *Michigan v. Long*, 463 U.S. 1032, 1047, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). This Court has recognized that "the risk of harm to both the police and the occupants [of a stopped vehicle] is minimized . . . if the officers *routinely* exercise *unquestioned command* of the situation." *Arizona v. Johnson*, __U.S. __, 129 S.Ct. 781, 786, 172 L.Ed.2d 694 (2009) [emphasis ours].

The *Mimms* and *Wilson* guidelines help to insure officer safety. The Fifth Circuit's ruling puts the suspect in control of the traffic stop, and forces law enforcement officers into the untenable position of being put at serious risk of harm, having the non compliant suspect drive off or call for backup from friends or family (as in this case), creating a greater risk of harm and frustrating traffic enforcement duties of law enforcement officials nationwide. Traffic suspects should not be allowed to behave as plaintiff did during this stop, i.e., refuse to cooperate, roll up her windows, lock her doors, refuse to comply with lawful orders or sign a citation, call her family for backup and keep her motor running, all at great risk to the road side officers. Traffic suspects should not be allowed to "litigate" the merits of a simple speeding citation on the side of the road at the risk of the officer. As addressed below, this result defies this Honorable Court's precedent and seriously hampers law enforcement by creating ambiguity and confusion as to what actions police officers can take to compel a recalcitrant driver from her vehicle.

The Fifth Circuit's decision is internally inconsistent in that the ruling held that Chief Marcantel had probable cause for the arrest on August 5, 2005, but not for the concurrent use of force, even though authorized by state statute. The probable cause defining decisions of this Honorable Court were ignored, and the Fifth Circuit misapplied Louisiana Statutes and Jurisprudence.

Moreover, given that every state and federal enclave has traffic laws which law enforcement officers enforce daily, the Fifth Circuit's decision has far reaching public policy implications that should be reviewed by this

Honorable Court. If left unreviewed, the Fifth Circuit's decision will inhibit police actions on traffic law enforcement, drug interdiction, and immigration control all across the nation, not only in Louisiana, Mississippi, and Texas. It will also encourage and enable traffic offenders to disregard lawful police orders and create untold dangerous situations for patrol officers across the nation. The Fifth Circuit ruling is likewise in conflict with the rulings of other Federal Circuit Courts, as they relate and have been applied post-*Mimms*.

1. Traffic Stop Giving Rise To Case

On August 5, 2005, Officer Dwayne Tarver stopped Michelle Deville for speeding based on the readout of his calibrated radar gun (R. 221, Deposition of Tarver, Ex. "A", p. 39-40, Court Doc. 42). Deville produced her driver's license and asked why Tarver stopped her. Deville never turned off her engine. Tarver told her he clocked her going 50 MPH in a 40 MPH zone, he needed proof of insurance, and he would write her a ticket for speeding. Deville flew into a rage, shouting obscenities at the police officer. (R. 221, Ex. "A" p. 42, Court Doc. 42). Deville admits she told the officer "that it was bull* * *t." (R. 221, Ex. "C", p. 43, ln. 17, Court Doc. 42). Deville claimed her cruise control was on so she could not have been speeding. At this point, Deville decided to try the merits of her traffic violation on the side of the road, a notion which is untenable under current U.S. Supreme Court rulings. She rolled up her window, locked her car door, refused to sign the ticket, called her husband and son to come to the scene, left her engine running, and refused to comply with the officer's lawful instructions, all while shouting obscenities.

After sitting on the road side for 21 minutes, Tarver called dispatch and reported that Deville was not cooperating (R. 221, Deposition of Ortego, Ex. "D" and attached dispatch log, Court Doc. 42). Chief Marcantel responded to Tarver's call for assistance. Marcantel identified himself as Chief of Police and ordered Deville to exit the vehicle. Deville refused Marcantel's lawful order to exit the vehicle. Marcantel tried to explain to Deville if she just signed the ticket, she could be on her way (R. 221, Ex. "A", p. 49, ln. 9-14, Court Doc. 42). Deville's car was still running (R. 221, Ex. "C", p. 53, ln. 10, Court Doc. 42). Chief Marcantel noticed a small child in the back seat crying and who appeared distressed, causing Tarver and Marcantel concern for the child's safety (R. 221, Ex. "A", p. 60, Court Doc. 42). Deville informed the officers she was calling her husband and son. Due to Deville's continued refusal to in any way comply with lawful orders, and expecting two male family members to arrive soon, Marcantel realized a custodial arrest was required. Since Deville's window remained up and her door locked, he broke the driver's window with a flashlight (R. 221, Ex. "A", p. 49, ln. 14-29, Court Doc. 42) to place her under arrest as authorized by La. R.S. 32:391. While being extracted from her vehicle, *Deville struck Marcantel on the forehead with her cell phone* (R. 221, Ex."A", p. 50, ln. 29; Ex. "B", p. 60; and medical records, Ex. "E", Court Doc. 42). Deville appeared to be attempting to put her vehicle in gear, forcing Tarver and Marcantel to reach inside, take hold of her hands to remove the keys from the ignition to prevent her from injuring them and/or fleeing the scene (R. 221, Ex. "A", p. 48 & 52, Ex. "B", p. 43, Court Doc. 42). Deville was removed from the vehicle, handcuffed, arrested, charged with speeding,

aggravated battery, and resisting an officer. Most of this was witnessed by independent witnesses, Roger Deville and Marlon Chaddrick (R. 221, Ex. "I" and Ex. "J"). The Fifth Circuit's ruling never mentions these independent and credible eye witnesses in their analysis of Chief Marcantel's actions on the remaining excessive force claim.

2. District Court Proceedings

The Federal District Court for the Western District of Louisiana granted Summary Judgment to Chief Marcantel based on qualified immunity and dismissed all Federal Law claims adverse Marcantel. (See Appendix at 33a). On Motion for Reconsideration, the District Court dismissed all of the Devilles' Louisiana State Law claims against Chief Marcantel, as well. (See Appendix at 40a).

3. Decisions of the United States Fifth Circuit Court of Appeal

The Devilles appealed the District Court's granting of qualified immunity and the dismissal with prejudice of all Federal and State Law claims. The Fifth Circuit, affirmed in part, reversed in part, and remanded the matter back to the District Court for further proceedings. (See Appendix at 1a). As to Deville's Federal Law claims, the United States Fifth Circuit Court of Appeal upheld the District Court's finding of qualified immunity as to the 42 U.S.C. § 1983 claim of false arrest against Marcantel for Deville's August 2005 arrest. The Fifth Circuit also upheld the District Court's dismissal of Deville's claims for false arrest, and

malicious prosecution under 42 U.S.C. § 1983 for Deville's May 2006 arrest, based on the presence of a valid arrest warrant. The District Court dismissed Deville's claims of unreasonable investigation leading up to the May 2006 arrest, finding no legal basis for the claim. The Fifth Circuit also dismissed Deville's State Law claims against Chief Marcantel for the August 2005 arrest, finding Chief Marcantel had probable cause for the arrest based on his reasonable reliance on information provided by another officer and information and facts Marcantel observed at the scene. The Fifth Circuit also dismissed the State Law claims for false arrest and malicious prosecution for the May 2006 arrest on the basis of a valid arrest warrant and no "bona fide termination" of the prosecution in favor of Deville.

However, despite the above findings with regards to Marcantel's acts, the Court of Appeal reversed the District Court's finding of qualified immunity as to Chief Marcantel on Deville's 42 U.S.C. § 1983 claim of excessive force for Deville's August 2005 arrest, stating that qualified immunity could not be granted, because there existed a triable issue as to the *degree* of force used. The Fifth Circuit likewise reversed the District Court's dismissal of the State Law excessive force claims on the same grounds. The Court of Appeal noted Deville's State Law claim for excessive force and battery rested on the lawfulness of the arrest. Despite its earlier ruling that Marcantel had probable cause based on information known to him for the arrest, as to excessive force, the Court ruled that since the August 2005 arrest was unlawful [i.e. lacked probable cause], any force used by Marcantel constituted a battery under state law. This finding is internally inconsistent and unreconcilable under both federal and state law.

Chief Louis Dale Marcantel timely filed a petition for rehearing *en banc*, based on the panel's decision denying qualified immunity for Deville's 42 U.S.C. § 1983 claim of excessive force and the reversal of the judgment of dismissal on the State Law excessive force and battery claims. The United States Fifth Circuit Court of Appeal refused to rehear the case *en banc* or by the original panel. (See Appendix at 74a).

REASONS FOR GRANTING THE PETITION

A writ of certiorari is warranted since the United States Fifth Circuit Court of Appeal's decision is contrary to and in conflict with the decisions and guidelines this Honorable Court has provided in similar qualified immunity jurisprudence. The Fifth Circuit decision incorrectly defines the "objectively reasonable" prong of the qualified immunity analysis by incorrectly answering the question of whether it was clearly established that a law enforcement officer violates a non compliant traffic stop suspect's Fourth Amendment rights when, in the course of a lawful arrest, or pursuant to state law, the officer breaks the vehicle's window to extract the non compliant suspect to effectuate a lawful arrest. The Fifth Circuit's ruling overrules this Honorable Court's ruling in *Mimms* and its progeny and at least in Louisiana, Texas and Mississippi, prevents an officer from being able to use reasonable force to compel a non compliant suspect from a vehicle on a traffic stop. Further, the Fifth Circuit's ruling is internally inconsistent regarding the issue of probable cause for the arrest and lawful use of force during a valid arrest pursuant to state law in Louisiana.

I. THE UNITED STATES FIFTH CIRCUIT COURT OF APPEAL'S DECISION IS CONTRARY TO THIS COURT'S QUALIFIED IMMUNITY PRECEDENT FINDING THAT THERE WAS A CLEARLY ESTABLISHED RIGHT.

The Fifth Circuit held Marcantel was entitled to qualified immunity for Deville's August 5, 2005 arrest. The Fifth Circuit refused to extend qualified immunity on the excessive force claims, both federal and state, because it found the *degree* of force used by Marcantel potentially unreasonable. (See Appendix at 17a). The Fifth Circuit thus found that it was clearly established that Deville had the right not to be forcibly extracted from her vehicle during the course of a traffic stop and arrested. The Fifth Circuit's decision is inconsistent with this Court's qualified immunity analysis, as well as Louisiana Code of Criminal Procedure Articles 220 and 224, *which expressly allow police officers to break a vehicle's window to effectuate a lawful arrest*, and this Court's decision of *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) which allows an officer to compel a driver out of a vehicle on a traffic stop. In light of the Fifth Circuit's ruling that Marcantel reasonably relied on his fellow officer's report of Deville's speeding and non compliance in signing the traffic citation, and based on the fact of Deville's continued acts of defiance in the Chief's presence, probable cause existed for Deville's arrest. The exigency of the situation as to the crying child and Deville's calling family members to the scene where also significant factors the Fifth Circuit ignored when analyzing the *de minimis* force used by Marcantel. The Fifth Circuit stated that "We pretermit considering or deciding

whether Marcantel unlawfully arrested Deville because it is clear that his actions with respect to Tarver's initial arrest of Deville were not objectively unreasonable." (See Appx at 14a). The Fifth Circuit held that Marcantel reasonably relied on Tarver's assertion of probable cause; thus, Marcantel reasonably believed he had probable cause to arrest. Therefore, if his arrest of plaintiff was lawful, he could use reasonable force to effectuate that arrest. Louisiana Code of Criminal Procedure article 220 states:

> A person shall submit peaceably to a lawful arrest. The person making the lawful arrest may use reasonable force to effect the arrest and detention, and also to overcome any resistence or threatened resistence of the person being arrested or detained.

Further, Louisiana Code of Criminal Procedure Art. 224 states, in part:

> In order to make an arrest, a peace officer, who has announced his authority and purpose, ***may break open an outer or inner door or window of any vehicle, . . . where the person to be arrested is or is reasonably believed to be, if he is refused or otherwise obstructed from admittance.*** . . .

[Emphasis ours]. Since La. C.Cr.P. art. 224 specifically allows Marcantel's action, and it is undisputed Marcantel announced his authority, Marcantel's degree of force used on August 5, 2005 was reasonable as a matter of law. The Fifth Circuit recognized that Chief Marcantel

did not handcuff Deville. Marcantel did break the vehicle window and helped extract Deville from the car, but there was no evidence that Marcantel utilized any other force on Deville. The Fifth Circuit took issue that Marcantel engaged in little negotiations with Deville prior to breaking the vehicle window. However, there was no duty to negotiate, especially after Tarver had done so for 21 minutes on the side of the road. Any force utilized by Marcantel after the window was broken to position her for handcuffing by Tarver was *de minimis*. Deville's refusal to exit the vehicle and her throwing her cell phone at the Chief's forehead mandated that some force be used to remove her. The only injury of which Deville can attribute to Marcantel is the minor cuts Deville sustained from the broken glass. Marcantel is entitled to qualified immunity on *all* claims. There is no dispute that Deville failed to cooperate and/or obey any of the lawful orders given on the road side for 21 minutes before Marcantel ever arrived that day. Under Louisiana law, a citation may be issued in lieu of a custodial arrest unless the suspect refuses to sign the citation. Deville chose her path and destiny when she refused the citation. Therefore, Chief Marcantel was mandated by law to effect a full custodial arrest under these facts.

Furthermore, there was no duty requiring the officers to walk away from the non compliant suspect. The purpose of qualified immunity is to shield law enforcement officers from the burden of fighting lawsuits arising from the good-faith performance of their duties. *Hunter v. Bryant*, 502 U.S. 224, 227-28, 112 S.Ct. 534, 116 L.Ed. 2d 589 (1991). Thus, the issue of qualified immunity must be settled at the earliest possible point

in the litigation. *Id.* This is what Federal District Judge Tucker L. Melancon did by considering all the evidence presented as this Honorable Court mandates that he do; however, the United States Fifth Circuit Court of Appeal did not and refused to do so in its analysis.

The issue, as properly framed for this Court's review is: Was Marcantel's action of breaking Deville's automobile window and forcibly removing her from the automobile to arrest her and to help keep Deville, the child, Tarver, the public and himself safe, objectively reasonable? It is undisputed Chief Marcantel ordered Deville out of her vehicle, and she refused to comply with this *lawful* order. *Mimms, supra.* This was a Constitutionally permissible and *lawful* action to insure officer safety during a traffic stop. See *Mimms, supra. State v. Benoit*, 2001-2712 (La.5/14/02), 817 So.2d 11, 15. This Court in *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) held the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is a distinct inquiry on the merits of the excessive force claim. The initial inquiry usually is whether a constitutional right would have been violated on the facts alleged. However, even if a violation could be made out on a favorable view of the parties' submissions, the next step is whether the right was clearly established. While it is recognized this Court eliminated *Saucier's* two step "rigid order of battle" in *Pearson v. Callahan*, __ U.S. __, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009), the Fifth Circuit still failed to properly undertake the "clearly established" analysis. Qualified immunity "gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Hunter*, 502

U.S. at 229. If officers of reasonable competence could disagree, immunity should be recognized. *Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir. 1995). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier*, 533 U.S. 194, 202. The concern of the qualified immunity inquiry is to acknowledge reasonable mistakes can be made as to the *legal* constraints on the particular police conduct, i.e. the *degree* of force an officer is entitled to use in a given situation. As this Court stated in *Wilson v. Layne*, 526 U.S. 603, 615, 119 S.Ct. 1692, 143 L.ED.2d 818 (1999), "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." Citing *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3043, 97 L.Ed.2d 523 (1987). This Court has never reached the issue of which type or the degree of force a police officer may use to compel a non compliant suspect out of a vehicle while on a traffic stop pursuant to *Mimms*, or what amount of force a police officer can use to effectuate a custodial arrest when the suspect refuses to exit the vehicle. Louisiana law follows *Mimms*, but has not addressed the issue either. Further, Louisiana has a statute allowing officers to break windows to effectuate an arrest under these facts. The Fifth Circuit found Marcantel believed he was making a lawful arrest. Based on a clearly established Louisiana statute, he utilized reasonable force to effectuate the lawful arrest. Marcantel broke the window with a flashlight as La. C.Cr.P. art. 224 allows. He did not shoot his weapon into the vehicle or place plaintiff in any serious danger.

See and compare *Atwater*, 532 U.S. at 354, citing *Whren v. United States*, 517 U.S. 806, 818, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (Where an "arrest was [not] made in an extraordinary manner, unusually harmful to [her] privacy or . . . physical interest.)" How else is a law enforcement officer to "compel" a person from his vehicle without use of any force? Chief Marcantel exercised great restraint and poise in a highly charged situation (entirely created by Deville's acts) and used only *de minimis* force. Clearly, the Court of Appeal was wrong when it found Marcantel was not entitled to qualified immunity for breaking the window of Deville's vehicle to force her compliance with a lawful order. Further, the Fifth Circuit found that Chief Marcantel did not handcuff Deville, *Tarver did*. (See Appendix at 19a). Marcantel's only use of force was to extract Deville from the vehicle. ***Marcantel should not be denied qualified immunity based on any alleged actions of Tarver.*** Issues of the existence of probable cause to arrest *before* Chief Marcantel came on scene are irrelevant. Marcantel broke the driver's side window and removed Deville from the vehicle based on his reasonable reliance on Tarver's comments, his own assessment of Deville's behavior, on a valid Louisiana statute and *Mimms*. The degree of force used by Chief Marcantel was not objectively unreasonable, since Marcantel reasonably relied on both *Mimms* and Louisiana law. The use of force was reasonable as a matter of law. Marcantel is entitled to qualified immunity on the Federal excessive force claim for several reasons: 1) In light of *Mimms* and La. C.Cr.P. art. 224, it cannot be said that it was "clearly established" that an officer uses constitutionally excessive force by breaking a suspect's window to compel her from the vehicle; 2) Even

if plaintiff proves a "clearly established" right, Chief Marcantel's actions were not objectively unreasonable in light of the plaintiff's actions, disobedience of lawful orders and ultimate battery upon Chief Marcantel; and 3) Chief Marcantel's use of force was sanctioned under Louisiana law generally and specifically pursuant to La. C.Cr.P. art. 224 and cannot, under these facts, be excessive as a matter of law. On the contrary, Deville created this situation and Chief Marcantel had a clearly established right to utilize the degree of force he did, breaking the car window to extract a non compliant suspect for arrest, based on a Louisiana statute and *Mimms*.

II. IF THERE WAS A "CLEARLY ESTABLISHED" RIGHT, CHIEF MARCANTEL'S DECISION TO UTILIZE FORCE TO EXTRACT THE NON COMPLIANT SUSPECT FROM THE VEHICLE DID NOT VIOLATE THE FOURTH AMENDMENT, AS MARCANTEL WAS "OBJECTIVELY REASONABLE" IN HIS USE OF FORCE

In this case, the question this Court is asked to answer is whether the law, as it existed when Chief Marcantel acted, was sufficiently clear to give reasonable officers fair notice that the action of breaking a suspect's car window to compel removal of the suspect from the vehicle was unlawful, given what he knew at the time he broke the window. *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed2d 666 (2002). The essence of qualified immunity is "fair warning." *Hope*, 536 U.S. at 740. Qualified immunity recognizes "even where personal liability does not ultimately materialize,

the mere 'specter of liability' may inhibit public officials in the discharge of their duties." *Atwater v. City of Largo Vista*, 532 U.S. 318, 351, 121 S. Ct. 1536, 1556, 149 L. Ed 2d 549 (2001), note 22.

This Court in *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), held that the police have the authority under the Fourth Amendment to order driver out of a vehicle during the course of a lawful detention for a traffic violation. *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997) extended the *Mimms* rule to passengers as well as drivers. The Louisiana Supreme Court in *State v. Benoit*, 2001-2712 (La.5/14/02), 817 So.2d 11, 15, recognized an officer may order a driver out of a vehicle on a traffic stop as well, citing *Mimms, supra*. This Court in *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) recognized the right to use some degree of force when making an arrest or detention. The issue of "whether it is a permissible use of force under the Fourth Amendment for an officer to break a car's window and forcibly remove a driver who refuses a lawful order to exit the vehicle?" is the crux of the excessive force claim against Marcantel. This Court has not reached this issue, specifically, but various Circuit Courts have touched similar issues with *Mimms* and *Graham* as their basis for ruling. See *U.S. v. Tellez*, 11 F.3d 530 (5th Cir. 1993) (approved forcefully pulling suspected parole violator out of a truck); *Mecham v. Frazier*, 500 F.3d 1200 (10th Cir. 2007) (qualified immunity granted, since at time of arrest no clearly established law foreclosed use of pepper spray to remove an uncooperative, unresponsive, belligerent traffic violator

from car she controlled); *Smith v. Ball State Univ.*, 295 F.3d 763 (7th Cir. 2002) (removal from automobile permissible when officers found student in driver's seat of running automobile and unresponsive to questioning). Clearly, it was reasonable for Chief Marcantel to use the force he did to compel Deville out of the car. The ability to compel or order the driver and the passenger out of the vehicle for officer safety is hollow without the corresponding authority to use some type of force to insure compliance with the officer's order.

Additionally, since Marcantel had probable cause to arrest Deville, under La. C.Cr. P. Art. 224, Marcantel could break the window. Louisiana law clearly shows that Marcantel's actions were objectively reasonable as a matter of law; thus, qualified immunity should have been granted to Chief Marcantel for his use of force in extracting plaintiff from the vehicle.

III. THE UNITED STATES FIFTH CIRCUIT COURT OF APPEAL'S DECISION IS NOT CORRECT ON THE STATE LAW USE OF FORCE ISSUE, SINCE THERE WAS PROBABLE CAUSE FOR THE ARREST AND ONLY REASONABLE FORCE WAS USED TO EFFECTUATE THE ARREST.

The decision of the Fifth Circuit is inconsistent regarding probable cause on the state law excessive force claim. Chief Marcantel had probable cause for Deville's arrest and the United States Fifth Circuit Court of Appeal *said so*. The Fifth Circuit upheld the District Court dismissal of the state law false arrest and imprisonment claim, finding probable cause for the

August 5, 2005 arrest under *Kyle v. City of New Orleans*, 353 So.2d 969 (La. 1977). (See Appendix at 27a and 28a). Later, however, the Court of Appeal found that the state law excessive force claim is similar to the Federal *Graham* factors and reversed the District Court's dismissal. In a footnote (#9), the Court of Appeal gratuitously theorizes (contrary to its earlier finding) that if the arrest was without probable cause, then *any* force used by Marcantel was unlawful under state law. However, the Fifth Circuit found that Marcantel did have probable cause to arrest Deville on August 5, 2005. In Louisiana, the term *Reasonable Cause*, relied on by the Fifth Circuit as quoted from *Kyle, supra.*, is the same as probable cause. (See Appendix at 28a). *State v. Weinberg*, 364 So.2d 964, 969 (La. 1978). La. Code of Criminal Procedure Article 213, states in pertinent part:

> A peace officer may, without a warrant, arrest a person when:
>
> * * *
>
> (3) The peace officer has reasonable cause to believe that the person to be arrested has committed an offense, although not in the presence of the officer. . . .
>
> * * *

The Louisiana Supreme Court has noted:

> "'This court has regarded the 'reasonable cause' standard of Article 213 as the equivalent of the general federal

> constitutional standard of 'probable cause.' *State v. Weinberg*, 364 So.2d 964, 969 (La. 1978). To read Article 213 as allowing an arrest on less than probable cause would put the article afoul of the Fourth Amendment."

State v. Fisher, 1997-1133 (La. 9/9/98), 720 So.2d 1179, 1183. Whether they realized it or not, the Fifth Circuit found probable cause for the August 5, 2005 arrest and relied on La. C.Cr. P. art. 213 and *Kyle, supra.* to do so. (See Appendix at 27a-28a). Louisiana law specifically allows a law enforcement officer to make a warrantless arrest for a crime not committed in his presence. The Fifth Circuit found that Marcantel reasonably relied on information provided to him by Tarver. Communications from other police officers coupled with the officer's own observation of corroborating facts can be the basis for probable cause. *Draper v. United States*, 358 U.S. 307, 312-13, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959). Considering the behavior of Deville when Marcantel approached her car, Marcantel independently developed probable cause for her arrest.

At the time Marcantel arrived at the traffic stop: 1) Deville still had her engine on; 2) Deville would not exit her vehicle after a lawful order to do so; 3) Deville refused to sign the ticket; 4) The child in the backseat appeared distressed; 5) Deville informed the officers she called her son and husband to the scene; 6) The traffic stop had lasted well over 21 minutes by the time Marcantel arrived; and 7) she hit Chief Marcantel in the head with her cell phone. These facts, in addition to Tarver's report of the traffic violation, were the basis of Marcantel's problable cause.

Since there was probable cause for the arrest and it was lawful, La. C.Cr.P. arts. 220 and 224 expressly allows police officers to break a window on a motor vehicle to effectuate an arrest. Further, it is respectfully submitted that *Mimms* and its progeny authorize some use of force to compel a driver or a passenger out of the vehicle. *Graham* says so. *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) citing, *Terry v. Ohio*, 392 U.S. 1, 22-27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). If not, then the reasoning, rationale and public policy announced by this Honorable Court of compelling a driver or a passenger out of a vehicle on a traffic stop for officer safety reasons is an empty vessel. The officer safety issue is moot if the police can not use force to extract the driver, especially where the suspect never turns off the engine!! The Fifth Circuit's ruling, in essence, has overruled *Mimms* and has written out the Louisiana statutory authority granted by the legislature to law enforcement officials dealing with recalcitrant drivers/offenders.

Overall, the Fifth Circuit was incorrect in failing to grant qualified immunity for the excessive force claim under 42 U.S.C. § 1983 on the general basis of an improper analysis that there was a clearly established right and/or that the breaking of the window to effectuate a lawful arrest was unreasonable and could constitute excessive force. The United States Fifth Circuit Court of Appeal committed legal error, as well, on the State law excessive force claim, since there was probable cause for arrest, and La. C.Cr.P. art. 224 allowed Chief Marcantel to use the exact force he employed herein. Therefore, both the federal and state excessive force claims against Marcantel should be

dismissed. This incorrect application of qualified and/or statutory immunity in light of a concrete finding of probable cause for plaintiff's arrest warrants a grant of *certiorari*.

IV. THIS CASE HAS SIGNIFICANT PUBLIC POLICY IMPLICATIONS FOR LAW ENFORCEMENT IN TRAFFIC STOP CASES

The United States Fifth Circuit Court of Appeal's decision evidences a policy preference that law enforcement officers should allow non compliant suspects to refuse to sign a traffic citation and blatantly defy lawful orders to exit the vehicle during lawful traffic stops and arrests. This policy undermines the very purpose of traffic laws, i.e. to protect the lives of the motoring public and overrules this Honorable Court's holdings in *Mimms*, and its progeny. Certainly there may be circumstances when allowing a suspect to remain in the vehicle or even escape is preferable, but when state law mandates a traffic law violation suspect sign the citation or be jailed, officers should be given the discretion to use reasonable force to terminate the traffic stop to protect the suspect, the officer and innocent bystanders. The officers could not just walk away. Deville kept Tarver on the roadside for 21 minutes by refusing to put down her window or exit her vehicle and accept her citation. She kept her engine running. She called her husband and son to come to the scene. From an officer's safety stand-point, this action causes police officers to be outnumbered at the scene. Deville increased the level of threat to the officers by her actions and assaulted the Chief by hitting him with her phone. The Fifth Circuit found Chief Marcantel made a lawful

arrest based on his reasonable reliance on the information provided to him by another police officer *and* probable cause corroborated by his own observations of Deville. There was probable cause for Deville's arrest. Since pursuant to *Mimms*, Marcantel could order plaintiff from her car, it necessarily follows that *some force* was legally sanctioned. This Court's Fourth Amendment jurisprudence "has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat to effect it." *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) citing, *Terry v. Ohio,* 392 U.S. at 22-27, 88 S.Ct., at 1880-1883. Further, Louisiana state law specifically provides that police officers can use this particular type of force and can break a vehicle window to effectuate a lawful arrest. La. C.Cr.P. art. 224. How else is a police officer to remove a non compliant suspect from a locked and running vehicle? Some force and ingenuity had to be used and was, that's why the situation was defused before the "family cavalry" got there and more violence to the officers, the Devilles or the minor child was avoided. *Mimms* and Louisiana jurisprudence imply that an officer can use force to remove a suspect, and the Louisiana Code of Criminal Procedure specifically allows use of force when making an arrest. The danger inherent in a non compliant suspect is why this Honorable Court has recognized "the risk of harm to both the police and the occupants [of a stopped vehicle] is minimized . . . if the officers *routinely* exercise *unquestioned command* of the situation." *Arizona v. Johnson,* __ U.S. __, 129 S.Ct. 781, 786, 172 L.Ed.2d 694 (2009) [Emphasis ours]. Deville did not allow this to happen, and the Fifth Circuit's decision does not follow this Honorable Court's simple, yet necessary dictate.

While petitioner contends there was no error here by Chief Marcantel, qualified immunity should nonetheless provide "accommodation for reasonable error," and "'officials should not err always on the side of caution' because they fear being sued." *Hunter v. Bryant*, 502 U.S. at 229 (1991). The Chief had probable cause for an arrest; *Mimms* and Louisiana state jurisprudence allowed him to compel the driver out of the vehicle at a traffic stop; and La. C.Cr.P. art. 224 allowed him to break the window to effectuate an arrest. In no way can it be said that it was clearly established that Chief Marcantel could not take the actions he did, especially when the jurisprudence and statutes expressly allow the action. The Fifth Circuit ignored United States Supreme Court guidance through precedent and Louisiana law on the issue.

There are compelling reasons for application of the qualified immunity doctrine in this case. Chief Marcantel was forced to make a split-second decision on the side of the road in an increasingly volatile situation as to whether to use force to compel this recalcitrant driver out of the vehicle, or do nothing and run the risk that Deville's continued irrational behavior would threaten the life of the suspect, the officer, or an innocent bystander (such as the crying minor child in the back seat of plaintiff's car). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 397. The situation was not of Chief Marcantel's creation, and he made a split-second choice supported by his reasonable reliance on Tarver's report, his own personal

observations, state statute and jurisprudence of this Honorable Court and the Louisiana Supreme Court.

CONCLUSION

Given the significance of the case for the law enforcement community – above and beyond simply the interests of the parties to this lawsuit – the Court should grant *certiorari* review. The orderly administration of justice, and the gravity of the implications of the decision nationwide, demands no less than the Court's attention to rectify the inconsistencies in the Fifth Circuit's ruling, and to provide guidance to law enforcement officials who face this type of situation on a daily basis.

For the foregoing reasons, Chief Marcantel respectfully requests that the decision of the United States Fifth Circuit Court of Appeal denying qualified immunity regarding excessive force and reinstating the State law excessive force claim be summarily reversed, or alternatively, that a petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED OCTOBER 20, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-31049

MICHELL B. DEVILLE; RICKY JAMES DEVILLE

Plaintiffs - Appellants

v.

LOUIS DALE MARCANTEL, individually and in his official capacity as Chief of Police of the Village of Turkey Creek, Louisiana; DEWAYNE TARVER, individually and in his official capacity as a duly commissioned law enforcement officer of the Village of Turkey Creek, Louisiana; VILLAGE OF TURKEY CREEK

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Louisiana

Before KING, DENNIS and ELROD, Circuit Judges.

PER CURIAM:

Michell B. Deville ("Deville") and her husband, Ricky James Deville, appeal from the district court's grant of summary judgment to defendants on their § 1983 and

state law claims, all of which stem from two separate arrests of Deville in August 2005 and May 2006. They primarily assert that the defendant officers arrested Deville without probable cause and used excessive force, causing her to suffer substantial physical injuries, and that the Village of Turkey Creek is liable as the officers' employer. For the reasons set forth below, we affirm in part and reverse in part, and remand for further proceedings.

I. BACKGROUND

The evidence, viewed in the light most favorable to plaintiffs, establishes: On the evening of August 5, 2005, Deville, a 45-year-old registered nurse, was driving with her two-year-old granddaughter through the Village of Turkey Creek, Louisiana, on her way to Monroe, Louisiana, where she planned to return her granddaughter to her daughter and spend the night. As she passed through Turkey Creek, Deville set her car's cruise control to 40 mph, which was the speed limit. However, she noticed a police cruiser with its lights on behind her, so she pulled to the side of the road, believing that it was merely attempting to go around her. When the cruiser came directly behind her, Deville realized that she was being pulled over. She moved completely off the side of the road and stopped her vehicle.

Turkey Creek Police Officer Dewayne Tarver, a defendant in this case, exited his cruiser and came to Deville's driver's side window. Tarver was in uniform and Deville immediately recognized him as a police

officer. Tarver requested Deville's name and driver's license, which she provided. She also asked why he pulled her over. Tarver responded that he "clocked [Deville] speeding 50 on the hill," 10 mph over the speed limit. Deville responded, "[T]hat wasn't possible; I had my cruise on 40." Tarver again stated that he clocked her at 50 mph and Deville responded "that it was bullshit." Tarver asked for her registration papers and, as Deville reached into her glove compartment to retrieve the papers, she repeated that the stop was "bullshit." Tarver then asked her to step out of the vehicle, to which she responded, "I haven't done anything wrong" and did not comply with Tarver's request to exit the vehicle. Tarver then asked her again to step out of the vehicle and stated that he was calling child services to pick up Deville's two-year-old granddaughter. Rather than comply with these instructions, Deville rolled her window up, and called her husband, daughter-in-law, and son. Tarver walked back to his cruiser and called Turkey Creek Chief of Police Louis Dale Marcantel.

Deville's husband and son agreed to come to the location of the stop and assist her with her granddaughter. Meanwhile, Chief Marcantel, who was off-duty that evening, arrived at the scene, spoke with Tarver, and then approached Deville's driver's side window—which was still rolled up. Marcantel showed his badge and spoke first, telling Deville that she "needed to get the window down or he was going to break it." According to Deville, Marcantel did not ask her to exit the vehicle. Deville did not roll her window

down, stating that she was waiting for her husband to arrive and "see about my baby." Deville recounted that Marcantel began hitting the window and her car with a black stick (said to be a heavy flashlight) and, even though she began to roll down the window, the glass broke before she was able to do so. Notably, Deville contends that she never saw a ticket, nor was she ever asked to sign one. The officers contend that they presented a ticket to her, but that she refused to sign it.

According to Deville, at that point Marcantel grabbed her through the window and opened the door, and "they" (presumably referring to Marcantel and Tarver) pulled her out of the vehicle. The officers did not hit her, although they threw her up against the vehicle, resulting in a blow to her abdomen area. She was placed in handcuffs and led towards the police cruiser. Deville fell to the ground on the way to the cruiser complaining of pain in her abdomen. The officers lifted Deville up and placed her in the back of the cruiser; her husband arrived shortly thereafter and took custody of the child.

Deville was taken to the Evangeline Parish Sheriff's Office. One of the officers had called an ambulance to meet them at the Sheriff's Office, and Deville initially refused medical treatment. Deville later requested treatment when she noticed that she was bleeding from her head, and the ambulance returned and transported Deville to the hospital. She was treated at the hospital, and a blood sample was taken and submitted to the

Louisiana State Crime Laboratory for analysis. Deville's husband and nurses at the hospital remarked that Marcantel smelled like alcohol, implying that he was intoxicated. After Deville finished at the hospital, she was taken back to the Sheriff's Office and charged with speeding, aggravated battery, and resisting an officer. She was released that night. The parish district attorney subsequently dropped the charges against Deville.

The toxicology report from the blood sample taken at the hospital showed the presence of Phentermine and Sentraline (caused by Deville's legal use of prescription medications). Based on this report, Marcantel later sought and obtained an arrest warrant from a justice of the peace against Deville for driving while under the influence of a controlled substance and for illegal use of a controlled substance in the presence of a minor.[1] The warrant issued on May 18, 2006, nearly nine months after the first arrest and approximately the same time Deville's counsel sent a letter to the Village of Turkey Creek giving notice that she would assert claims based on the first arrest. Deville was arrested pursuant to that warrant on June 13, 2006, and released. Deville alleges these controlled substance charges were baseless and motivated only by her threat of litigation against Marcantel and the other defendants. The parish district attorney later dropped these charges as well.

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1. There is no evidence in the record that Marcantel knew when he sought the warrant that the substances were prescribed to Deville. Indeed, Marcantel's deposition testimony is uncontroverted that Deville told the paramedics and hospital staff that she was not taking prescription medication.

Appendix A

Defendants have a very different view of the August 2005 stop and arrest. They claim that Deville was speeding (Tarver states that he clocked her going 10 mph over the speed limit using his radar gun), that she became enraged during the stop, shouted obscenities at the officers, and refused to sign the speeding ticket. The officers state they were concerned about the welfare of the child, whom they felt was in clear distress as a result of Deville's behavior. Marcantel testified that he informed Deville that she was under arrest and commanded her to exit the vehicle. This led to the officers' forcible removal of Deville from the vehicle, although Marcantel testified that the officers "didn't shove her, ... didn't push her, didn't beat on her" and that Deville threw a cell phone that hit Marcantel. The officers did not call protective services, however, but released the grandchild to Mr. Deville when he arrived at the scene.

On August 24, 2006, Deville and her husband filed suit in Louisiana state court against the Village of Turkey Creek, and Chief Louis Marcantel and Dewayne Tarver, both individually and in their official capacities. Defendants thereafter removed the case to the United States District Court for the Western District of Louisiana. Plaintiffs' complaint asserted claims under § 1983 against Tarver and Marcentel based on unreasonable search and seizure, false arrest, battery, excessive force, and malicious prosecution, the First Amendment, and the Ninth Amendment, as well as a claim that Tarver and Marcentel conspired to violate her civil rights in violation of § 1985. The plaintiffs also

alleged § 1983 claims against the Village of Turkey Creek on the basis that it maintained policies or customs exhibiting deliberate indifference to Deville's civil rights. Finally, the plaintiffs asserted claims under Louisiana law for assault, battery, excessive force, false arrest, false imprisonment, and malicious prosecution (with the Village of Turkey Creek vicariously liable). The officers raised qualified immunity as a defense.

The Village of Turkey Creek moved for judgment on the pleadings under Rule 12(c), and all defendants—including the Village of Turkey Creek—moved for summary judgment. The district court considered these motions together, and concluded that plaintiffs did not meet their burden on summary judgment with respect to the federal claims. Accordingly, the district court granted the defendants' motions for summary judgment as to the federal claims, dismissing them with prejudice, and declined to exercise jurisdiction over the remaining state-law claims, dismissing them without prejudice. Because the Village of Turkey Creek's motion for judgment on the pleadings dealt with the state-law claims exclusively, the district court denied that motion. All parties, including every defendant, made motions for reconsideration, with plaintiffs requesting reconsideration of the ruling on the federal claims and defendants requesting reconsideration of district court's decision not to exercise supplemental jurisdiction over the state-law claims. The district court granted the defendants' motion and dismissed all of plaintiffs' state-law claims with prejudice, and denied plaintiffs' motion to reconsider.

Plaintiffs timely appealed.

Appendix A

II. STANDARD OF REVIEW

We review the district court's grant of summary judgment *de novo*. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir.2007). A party is entitled to summary judgment only if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). On a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *See Hockman v. Westward Commc'ns, LLC*, 407 F.3d 317, 325 (5th Cir.2004). In reviewing the evidence, the court must "refrain from making credibility determinations or weighing the evidence." *Turner*, 476 F.3d at 343.

III. DISCUSSION

The district court granted summary judgment to defendants on the following claims, all of which plaintiffs have adequately briefed: (1) § 1983 false arrest claims against Marcantel and Tarver arising from the August 2005 arrest; (2) § 1983 excessive force claims against Marcantel and Tarver arising from the August 2005 arrest (including a specific allegation against Tarver that he used excessive force in applying the handcuffs too tightly); (3) § 1983 false arrest and malicious prosecution claims against Marcantel arising from the May 2006 arrest; (4) a § 1983 claim against the Village

of Turkey Creek; and (5) equivalent claims under Louisiana law. Each claim is addressed in turn.[2]

A. False Arrest: August 2005 Arrest

To establish that the individual defendants violated Deville's constitutional rights by arresting her in August 2005, plaintiffs must show that the officers lacked probable cause. *See Haggerty v. Tex. S. Univ.*, 391 F.3d 653, 655 (5th Cir.2004). "A warrantless arrest must be based on 'probable cause.' Probable cause exists when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *Resendiz v. Miller*, 203 F.3d 902, 903 (5th Cir.2000). "If there was probable cause for any of the charges made . . . then the *arrest* was supported by probable cause, and the claim for false arrest fails." *Wells v. Bonner*, 45 F.3d 90, 95 (5th Cir.1995).

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2. Plaintiffs have not presented argument on appeal for the following claims and issues: (1) the unlawful arrest and malicious prosecution claims against Tarver based on the second arrest; (2) the First Amendment; (3) the Ninth Amendment; (4) § 1985 and § 1986; and (5) conspiracy under Louisiana Civil Code Art. 2324. These claims and issues are therefore deemed waived. *See In re Tex. Mortgage Services Corp.*, 761 F.2d 1068, 1073 (5th Cir.1985). Plaintiffs also concede that the claims against Marcantel and Tarver in their official capacity should be treated as claims against the Village of Turkey Creek.

Turning to Deville's false arrest claim against Tarver, Deville was charged with three offenses: failure to sign a traffic ticket, resisting an officer, and speeding. Plaintiffs have met their burden at summary judgment to show that there is a genuine issue as to the material fact of whether Tarver lacked probable cause to arrest Deville for those offenses. First, the relevant Louisiana statute permits officers to make full-custody arrests of persons who refuse to sign a traffic ticket, in lieu of issuing the usual citation. *See* La.Rev.Stat. § 32:391(B) (West.2002).[3] But the statute does not establish a criminal offense; it only establishes the procedure for arrests when a traffic offense has already occurred. *See id.* In this case, there is a disputed issue of fact as to whether the officers presented a ticket to Deville and, consequently, whether she refused to sign it. Second, under Louisiana law, a person commits the offense of resisting arrest only if he resists a "lawful arrest"; that is, an arrest supported by probable cause.

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3. "If the person arrested holds a Louisiana operator's license and gives his written promise to appear at the time and place stated, the officer may release him from custody or take him immediately before a magistrate, but shall not require the person arrested to deposit his operator's license. Any such person refusing to give the written promise to appear shall be taken immediately by the arresting officer before the nearest or most accessible magistrate having jurisdiction. Any person who willfully violates his written promise to appear shall be punished as provided in R.S. 32:57.1, regardless of the disposition of the charge upon which he was arrested originally. The arresting officer shall fully inform the arrested person of the consequences of failing to honor a written promise to appear pursuant to R.S. 32:57.1."

See La.Rev.Stat. § 14.108(A) (West 2004); *State v. Lindsay*, 388 So.2d 781, 782 (La.1980) ("It is a long-established principle in Louisiana law that a citizen has the right to resist an unlawful arrest."). Thus, whether Deville was lawfully arrested depends on whether Tarver had probable cause to conduct an arrest at all. If not, then any resistance by Deville was lawful and did not constitute "resisting arrest." *See Lindsay*, 388 So.2d at 782.

An officer may conduct a warrantless arrest based on probable cause that an individual has committed even a minor offense, including misdemeanors. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001). Tarver stated in his deposition testimony that he detected Deville going 50mph in a 40mph zone using his radar gun, which he said he was operating correctly.[4] Plaintiffs have offered Deville's deposition testimony, in which she testified that she was in fact not speeding, as evidenced by the fact that she set her vehicle's cruise control at the 40mph speed limit. However, evidence that the arrestee was innocent of the crime is not necessarily dispositive of whether the officer had probable cause to conduct the arrest because "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *See Illinois v. Gates*, 462 U.S. 213, 244 n. 13, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

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4. Marcantel verified that the radar gun in Tarver's cruiser was working in August 2005. He also noted that the radar gun became inoperable approximately one year earlier, but that it had been fully repaired by the time of Deville's first arrest.

Thus, Tarver's uncontradicted testimony that his radar gun indicated that Deville was speeding could establish probable cause for the arrest. *See United States v. Coney*, 456 F.3d 850, 857 (8th Cir.2006).

Plaintiffs, however, have provided evidence that would allow the jury to disbelieve Tarver's testimony. "[A] motion for summary judgment cannot be defeated solely by conclusional allegations that a witness lacks credibility. Nevertheless, when the circumstances are conducive to lying, well-supported suspicion of mendacity may serve as a legitimate basis for the factfinder's reasonable inferences concerning the ultimate facts at issue." *Thomas v. Great Atl. & Pac. Tea Co.*, 233 F.3d 326, 331 (5th Cir.2000) (footnote omitted). Summary judgment is not appropriate when "questions about the credibility of key witnesses loom . . . large" and the evidence could permit the trier-of-fact to treat their testimony with "skeptical scrutiny." *Id.* at 331.

Tarver admitted that he has a history of problematic arrests and that citizens have made complaints against him. The Evangeline Parish Sheriff asked him to resign his position as a sheriff's deputy (which he held simultaneously with his position with the Village of Turkey Creek) because of a complaint of excessive force in an unrelated case. More directly implicating his credibility, Tarver admits the parish district attorney asked him to resign from the Turkey Creek police department because he filed a false charge of possession of marijuana against an individual who in fact did not

have marijuana (that incident is also otherwise unrelated to the instant case).[5] And although Tarver testified that the radar gun had the ability to "lock-in" a detected speed, he did not "lock-in" the speed in the Deville case—and, as a result, he was unable to verify the speed when asked by Deville's husband to do so. In light of this discrediting evidence—especially evidence that Tarver has falsified other charges—and Deville's sworn testimony that she was not speeding because her cruise control was set on 40mph, a reasonable jury could disbelieve Tarver's testimony and find that he lacked probable cause for the first arrest.[6]

"Despite their participation in . . . constitutionally impermissible conduct, Defendants may nevertheless be shielded from liability for civil damages if their actions

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5. These events occurred after the events at issue in this case. *See infra* p. 171-72. Prior to his resignation from the Evangeline Parish Sheriff's Office, Tarver worked contemporaneously for both the Sheriff's Office and the Village of Turkey Creek Police Department on a part-time basis.

6. Although we conclude *infra* that Marcantel is entitled to qualified immunity because he relied on Tarver's statements, that reliance does not make an otherwise unconstitutional arrest lawful. *See Whiteley v. Warden*, 401 U.S. 560, 568-69, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971) (holding that "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest"); *see also Rogers v. Powell*, 120 F.3d 446, 455-56 (3d Cir.1997) (holding that arrest was unsupported by probable cause but granting qualified immunity to defendants who made the arrest in reliance on communications with other officers).

did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). There is no doubt that it was clearly established in August 2005 that "[a]n arrest is unlawful unless it is supported by probable cause." *Flores v. City of Palacios*, 381 F.3d 391, 402 (5th Cir.2004); *see Blackwell v. Barton*, 34 F.3d 298, 303 (5th Cir.1994). An officer's conduct is objectively reasonable "if a reasonable person in their position could have believed he had probable cause to arrest." *Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir.2000). Thus, because there are genuine issues as to the material facts of whether Deville was detected to have been speeding, whether she was asked sign a traffic ticket and whether she was validly exercising her established right under Louisiana law to resist an unlawful arrest, we conclude that Tarver is not entitled to qualified immunity.

Turning to Deville's false arrest claim against Marcantel stemming from the August 2005 arrest, we affirm the district court's grant of summary judgment. We pretermit considering or deciding whether Marcantel unlawfully arrested Deville because it is clear that his actions with respect to Tarver's initial arrest of Deville were not objectively unreasonable. "[W]here a police officer makes an arrest on the basis of oral statements by fellow officers, an officer will be entitled to qualified immunity from liability in a civil rights suit for unlawful arrest provided it was objectively

reasonable for him to believe, on the basis of the statements, that probable cause for the arrest existed." *Rogers v. Powell*, 120 F.3d 446, 455 (3d Cir.1997). Here, the uncontroverted evidence shows that Tarver communicated the reason for the stop to Marcantel, specifically relaying that Deville had been speeding and refused to sign the traffic ticket. And there is no evidence that Marcantel had a reason to disbelieve Tarver's account at the time of the August 2005 arrest. Accordingly, Marcantel could reasonably believe that Deville was speeding because he had an account of criminal activity from a seemingly reliable witnessing officer.

B. Excessive Force

To establish a claim of excessive force under the Fourth Amendment, plaintiffs must demonstrate: "(1) injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Tarver v. City of Edna*, 410 F.3d 745, 751 (5th Cir.2005). Excessive force claims are necessarily fact-intensive; whether the force used is "excessive" or "unreasonable" depends on "the facts and circumstances of each particular case." *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *see also Brosseau v. Haugen*, 543 U.S. 194, 201, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (observing that this "area is one in which the result depends very much on the facts of each case"). Factors to consider include "the severity of the crime at issue, whether the suspect poses an immediate threat

to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396, 109 S.Ct. 1865.[7]

Applying the *Graham* factors to this case, we conclude the district court erred in granting summary judgment to defendants. Deville was stopped for a minor traffic violation—exceeding the 40 mph speed limit by 10mph—making the need for force substantially lower than if she had been suspected of a serious crime. She testified that she was never asked to sign a traffic ticket, and therefore never refused to sign one. According to Deville's account of the stop, there was no reason to believe that her actions posed a threat to the officers, herself, or to her grandchild—whom Deville testified was perfectly calm until Marcantel began beating and breaking the car window. And, while she was in control of the vehicle and its motor was running and its gear in park, she said there was no evidence or other indication that she would flee or use the vehicle as a weapon. Indeed, she told the officers that she was waiting for her husband to arrive. Defendants have not argued on appeal that she actually attempted to flee. Most importantly, there is a factual dispute over the nature of Deville's resistance. According to Deville's version of events, her resistance was, at most, passive in that she merely refused to leave her grandchild and exit the

7. Plaintiffs' § 1983 "excessive force claim is separate and distinct from [their] unlawful arrest claim, and we must therefore analyze the excessive force claim without regard to whether the arrest itself was justified." *See Freeman v. Gore*, 483 F.3d 404, 417 (5th Cir.2007).

vehicle until Mr. Deville came to get the child—not that she affirmatively, physically resisted as the officers contend.

Officers may consider a suspect's refusal to comply with instructions during a traffic stop in assessing whether physical force is needed to effectuate the suspect's compliance. *See Mecham v. Frazier*, 500 F.3d 1200, 1205 (10th Cir.2007); *Wertish v. Krueger*, 433 F.3d 1062 (8th Cir.2006). However, officers must assess not only the need for force, but also "the relationship between the need and the amount of force used." *See Gomez v. Chandler*, 163 F.3d 921, 923 (5th Cir.1999). Taking the facts in the light most favorable to plaintiffs, a jury could reasonably find that the *degree* of force the officers used in this case was not justifiable under the circumstances. A reasonable jury could infer from Deville's deposition testimony that Marcantel engaged in very little, if any, negotiation with her—and find that he instead quickly resorted to breaking her driver's side window and dragging her out of the vehicle. The district court apparently credited the officers' statements that Deville's endangerment of her grandchild's safety required a high degree of force. However, the cause of the child's fear and upset is genuinely in dispute; Deville testified that the child was quiet during the stop, was not in danger, and only became distressed when the officers began using force. Both parties' experts agree that continued negotiations are more appropriate than actual force where the suspect is only stopped for a minor traffic offense and is making no attempt to flee. To the extent the officers claim they needed to use force

to prevent Deville from fleeing or using the vehicle as a weapon, Deville testified that the car's motor was running but that she never put the vehicle in gear.[8] And it is undisputed that Deville told the officers she was waiting for her husband to arrive, indicating that she was not going to flee.

Finally, the jury could view the severity of Deville's injuries as evidence of excessive force. "In evaluating excessive force claims, courts may look to the seriousness of injury to determine 'whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction as is tantamount to a knowing willingness that it occur.' " *Brown v. Lippard*, 472 F.3d 384, 386-87 (5th Cir.2006) (quoting *Whitley v. Albers*, 475 U.S. 312, 321, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986)). Thus, "the extent of [the] injury inflicted" may be considered in determining whether the officers used excessive force. *Whitley*, 475 U.S. at 321, 106 S.Ct. 1078 (internal quotation marks omitted); *see Jones v. Buchanan*, 325 F.3d 520, 530 (4th Cir.2003). The day after the arrest, Deville visited a doctor who observed contusions to both wrists, neuropathy of her hands, right shoulder strain, left shoulder bruising (with hand prints), and multiple cuts caused by broken glass (with one on her forehead). A week later, she visited her doctor complaining of left elbow and jaw pain, resulting from

8. Indeed, it is understandable that Deville would need to leave the vehicle running in order to keep the temperature cool for her infant grandchild, as the stop occurred in August in central Louisiana.

the arrest. Deville also complained in her deposition testimony of chronic, lasting injuries to her right elbow caused by the arrest. She also suffered neuropathy in her hands and fingers, which required four surgeries and multiple other injections. She testified that she missed 13 to 15 weeks of her work as a registered nurse because of these injuries.

As to the allegation that Tarver used excessive force in that he applied the handcuffs too tightly, we have held "that minor, incidental injuries that occur in connection with the use of handcuffs to effectuate an arrest do not give rise to a constitutional claim for excessive force." *Freeman v. Gore*, 483 F.3d 404, 417 (5th Cir.2007). In *Freeman*, the plaintiff alleged that she "suffered bruising on her wrists and arms because the handcuffs were applied too tightly," and the court found those injuries were too minor to support an excessive force claim. *Id.* In this case, Deville has provided evidence that the handcuffs were applied so tightly as to cause long-term nerve damage that was severe enough to require four surgeries. These injuries are not *de minimis*. *Compare Tarver v. City of Edna*, 410 F.3d at 751-52 (holding that " 'acute contusions of the wrist' and psychological injury from being handcuffed" were *de minimis* and insufficient to find excessive force). While the officers claim that she did not complain about being cuffed too tightly and Tarver claims he used his finger to "double lock" the cuffs, the injuries Deville sustained as well as her testimony that Tarver did not perform the double-lock procedure create genuine issues as to these material facts. Thus, in light of the other

factual disputes outlined above, plaintiffs have established the presence of material factual disputes regarding Tarver's alleged use of excessive force in applying the handcuffs.

Defendants contend they are entitled to qualified immunity on plaintiffs' § 1983 excessive force claims even if Deville has shown she was deprived of a constitutional right. When the arrest occurred, Deville had a clearly established right to be free from excessive force, *Tarver v. City of Edna*, 410 F.3d at 753-54, and it was clearly established that the amount of force that the officers could use "depend[ed] on the severity of the crime at issue, whether the suspect posed a threat to the officer's safety, and whether the suspect was resisting arrest or attempting to flee," *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir.2008). Accepting Deville's version of events for summary judgment purposes, this case involved: a traffic stop for a minor traffic offense unsupported by probable cause; Deville's passive resistance to being removed from her car and separated from her grandchild, in compliance with her well-established rights under state law to resist an unlawful arrest (*i.e.*, an arrest unsupported by probable cause); the officer's threat of calling child protective services despite no indication that the child was in distress or that Deville intended to flee; an officer who others said smelled of alcohol beating on Deville's driver's window with a heavy flashlight and breaking the window; a rough extraction of Deville from the vehicle by both officers, causing a forceful blow to Deville's abdomen; and handcuffs applied so tightly that they caused severe

nerve damage. These alleged facts are sufficiently egregious to warrant a denial of qualified immunity because a reasonable officer would have known that the degree of force was unconstitutionally excessive under the circumstances. *See Bush*, 513 F.3d at 501. Accordingly, defendants are not entitled to qualified immunity on the § 1983 excessive force claims.

C. False Arrest and Malicious Prosecution: May 2006 Arrest

Plaintiffs next argue that the district court erroneously granted summary judgment to defendants on their alleged constitutional violations stemming from the May 2006 arrest. We disagree.

This court has held that the federal Constitution does not include a "freestanding" right to be free from malicious prosecution. *See Castellano v. Fragozo*, 352 F.3d 939, 945 (5th Cir.2003) (en banc). Instead, it must be shown that the officials violated specific constitutional rights in connection with a "malicious prosecution." For example, "the initiation of criminal charges without probable cause may set in force events that run afoul of the . . . Fourth Amendment if the accused is seized and arrested . . . or other constitutionally secured rights if a case is further pursued." *Id.* at 953-54. However, these "are not claims for malicious prosecution." *Id.* at 954. Accordingly, plaintiffs' claim under § 1983 for "malicious prosecution" in respect to the May 2006 arrest is not independently cognizable, and defendants are therefore entitled to summary judgment on that claim.

Turning to plaintiffs' May 2006 unlawful arrest claim, plaintiffs offer two theories of liability: (1) that there was not probable cause to support the second arrest, and (2) that Marcantel failed to conduct a reasonable investigation prior to the arrest. Even if we assume that Marcantel made the May 2006 arrest without probable cause, he nevertheless made the arrest pursuant to a valid arrest warrant signed by a justice of the peace. "It is well settled that if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party." *Taylor v. Gregg*, 36 F.3d 453, 456 (5th Cir.1994); *see also Murray v. Earle*, 405 F.3d 278 (5th Cir.2005) ("[W]hen a neutral intermediary, such as a justice of the peace, reviews the facts and allows a case to go forward, such an act 'breaks the chain of causation.' " (quoting *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir.1988))). Despite review by an independent intermediary, the initiating party may be liable for false arrest if the plaintiff shows that "the deliberations of that intermediary were in some way tainted by the actions of the defendant." *Hand*, 838 F.2d at 1428. Plaintiffs have not argued that defendants somehow tainted the justice of the peace's deliberations, meaning that review by that independent intermediary relieves them of liability for the alleged false arrest, and the district court thus properly granted summary judgment to them on this claim.

Finally, plaintiffs have not pointed to any legal basis for asserting a claim under § 1983 that Marcantel

violated Deville's constitutional rights by failing to undertake a reasonable investigation. Accordingly, defendants are entitled to summary judgment on this "unreasonable investigation" claim. *See Shields v. Twiss*, 389 F.3d 142, 150-51 (5th Cir.2004) ("Regarding Shields's 'unreasonable investigation' claim, Shields has pointed to no legal basis for a § 1983 action of this sort, and the court knows of none. Hence, this claim also fails.").

D. Municipal *Monell* Liability

Plaintiffs next assert that the district court erred in granting summary judgment to the Village of Turkey Creek on their § 1983 claims. We disagree and thus affirm the district court on this issue.

Plaintiffs have argued that the Village of Turkey Creek is liable for its deliberately indifferent failure to adequately train and supervise Marcantel and Tarver. *Respondeat superior* does not apply to municipalities for claims under § 1983. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Rather, a municipality is liable under § 1983 only if its "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id.* at 694, 98 S.Ct. 2018. The plaintiff can prove the existence of a municipal policy through, *inter alia*, the actions of the municipality's legislative body or an individual with final decisionmaking authority. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 483-84, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). The plaintiff can also prove

the existence of a municipal custom by pointing to a "persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." *Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir.1984) (en banc).

In *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), a case specifically involving the training of police officers, the Court held that a municipality can be liable under § 1983 for failing to train its employees. *Id.* at 387, 109 S.Ct. 1197. However, the "inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388, 109 S.Ct. 1197. The Court further elaborated that "[o]nly where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality—a 'policy' as defined by our prior cases—can a city be liable for such a failure under § 1983." *Id.* at 389, 109 S.Ct. 1197. We have extended *City of Canton* to cover a plaintiff's allegations that the municipality failed to properly discipline its employees. *See Piotrowski v. City of Houston*, 237 F.3d 567, 581 (5th Cir.2001) ("Self-evidently, a City policy of inadequate officer discipline could be unconstitutional if it was pursued with deliberate indifference toward the constitutional rights of citizens.").

First, the evidence shows that Tarver has had only one other excessive force complaint against him (the

unrelated excessive force complaint that led to his resignation from his position as a sheriff's deputy), which was filed *after* the Deville incident. The district attorney asked him to resign his position as a Turkey Creek officer for making a false charge after the Deville incident as well. Deputy Adam Fruge of the Evangeline Parish Sheriff's Department knew Tarver as a former colleague with the Sheriff's Department and through Fruge's interaction with Turkey Creek officers. He testified that Tarver was hard to work with because he had a "quick temper" and used force on a couple of occasions when Fruge would have taken different action. Fruge also noted that Tarver may have been untruthful while testifying in court on a prior occasion. However, there is no indication in Fruge's testimony that anyone other than Fruge knew of these problems, or that the Village or the relevant policymakers knew about them. Finally, as to Marcantel, Marcantel testified that he was once the subject of an anonymous complaint, filed with the state troopers, that he smelled of alcohol on a traffic stop. According to Marcantel, the troopers investigated immediately and found that he had not been drinking.

At bottom, plaintiffs have not introduced evidence that would permit a jury to find that the Village of Turkey Creek acted with deliberate indifference towards Deville's constitutional rights in failing to discipline these officers. There is no evidence that formal complaints were filed against them before the Deville incident, despite Fruge's concerns about Tarver's performance, and there is no evidence that the village or the relevant decisionmakers knew about those

problems. Thus, plaintiffs have not shown that the Village's alleged failure to discipline the officers was undertaken with "deliberate indifference to the 'known or obvious consequences' that constitutional violations would result." *Piotrowski*, 237 F.3d at 579, 581 (quoting *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 407, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997)); *see also Scott v. Moore*, 114 F.3d 51, 54-55 (5th Cir.1997) (en banc) (finding no genuine issue regarding city's alleged deliberate indifference when there was "no showing that the city had actual knowledge" that its actions created a risk of harm to the plaintiff and had received no prior complaints regarding the tortfeasor-employee). Accordingly, the district court did not err in granting summary judgment to the Village of Turkey Creek on plaintiffs' § 1983 claims.

E. Claims Under Louisiana Law

Plaintiffs have alleged and briefed the following state-law claims against Tarver and Marcantel: (1) false arrest and imprisonment, (2) excessive force and battery; and (3) malicious prosecution. Plaintiffs have also asserted a vicarious liability claim against the Village of Turkey Creek. These claims are addressed in turn.

1. False Arrest and Imprisonment

Under Louisiana law, "[f]alse arrest and imprisonment occur when one arrests and restrains another against his will without a warrant or other statutory authority. Simply stated, it is restraint without

color of legal authority." *Kyle v. City of New Orleans*, 353 So.2d 969, 971 (La.1977). A facially valid arrest warrant immunizes the officers from false arrest and imprisonment claims, thus precluding plaintiffs from maintaining this claim based on the second arrest. *See Deville v. Jefferson Parish Sheriff's Dep't*, 762 So.2d 641, 643 (La.Ct.App.2000); *Rodriguez v. Deen*, 759 So.2d 1032, 1035 (La.Ct.App.2000); *Molette v. City of Alexandria*, 2005 WL 2445432, at *8 (W.D.La.2005). As to the first arrest, the officers had statutory authority for the arrest only if they had probable cause. Louisiana Code of Criminal Procedure article 213 provides that "a law enforcement officer may arrest a person without a warrant when that officer has 'reason to believe that the person to be arrested has committed an offense.' " *State v. Smith*, 960 So.2d 369, 375 (La.Ct.App.2007). This requires that an officer have probable cause for the arrest. *See State v. Hathaway*, 411 So.2d 1074, 1078-79 (La.1982). As discussed above, viewing the evidence in the light most favorable to plaintiffs, Tarver lacked probable cause for the first arrest. Accordingly, the district court also erred in granting summary judgment to Tarver on plaintiffs' state-law false arrest and imprisonment claim, insofar as it relates to the August 2005 arrest.

As to Marcantel's liability for the August 2005 arrest, we believe the decision in *Kyle* is instructive. *Kyle* involved false arrest and imprisonment claims asserted against two police officers who, relying on information communicated to them by two security guards, arrested the plaintiffs on suspicion that they had committed an

armed robbery. *See Kyle*, 353 So.2d at 972. The Louisiana Supreme Court held that the officers could not be held liable for false arrest and imprisonment because "the statements [of the security guards] gave the officers reasonable cause to believe that [the plaintiffs] had robbed the supermarket." *Id.* Similarly, in this case, the uncontroverted evidence shows that Marcantel relied on the seemingly reliable statements of officer Tarver as to Deville's speeding and refusal to accept a ticket. There is no evidence establishing that, at the time of the arrest, Marcantel had reason to disbelieve Tarver's description of the criminal activity, or to question his reasons for arresting Deville. Accordingly, under *Kyle*, the district court did not err in granting summary judgment to Marcantel on plaintiffs' state-law false arrest and imprisonment claim.

2. **Excessive Force/Battery**

Louisiana's excessive force tort mirrors its federal constitutional counterpart. "The use of force when necessary to make an arrest is a legitimate police function. But if the officers use unreasonable or excessive force, they and their employer are liable for any injuries which result." *Kyle*, 353 So.2d at 972. "Whether the force used is reasonable depends upon the totality of the facts and circumstances in each case," and factors to consider are: (1) the known character of the arrestee, (2) the risks and dangers faced by the officers, (3) the nature of the offense involved, (4) the chance of the arrestee's escape if the particular means are not employed, (5) the existence of alternative

methods of arrest, (6) the physical size, strength, and weaponry of the officers compared to the arrestee, and (7) the exigencies of the moment. *Id.* at 973. These considerations are sufficiently similar to the *Graham* factors that our decision on this claim mirrors our decision of plaintiffs' § 1983 excessive force claim, and we thus reverse the district court's grant of summary judgment to defendants on the state-law excessive force/battery claim. *See Penn v. St. Tammany Parish Sheriff's Office*, 843 So.2d 1157, 1159-60 (La.Ct.App. 2003).[9]

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9. Although plaintiffs' federal excessive force claim does not depend on the constitutionality of the underlying arrest, *see Freeman*, 483 F.3d at 417, that principle does not apply to their state-law excessive force and battery claims. Louisiana law authorizes only that "the person making a *lawful* arrest may use reasonable force to effect the arrest and detention." La.Code Crim. P. art. 220 (emphasis added). "If the arrest is unlawful then all force used to effectuate the arrest is excessive and constitutes a battery." *LaBauve v. State*, 618 So.2d 1187, 1193 (La.Ct.App.1993); *see also Ross v. Sheriff of Lafourche Parish*, 479 So.2d 506, 510 (La.Ct.App.1985) ("The jurisprudence . . . establishes that the physical attack of a private citizen by a police officer absent a valid arrest constitutes a battery."). As noted above, an unlawful arrest is an arrest lacking probable cause. *Martin v. Michael J. Neustrom*, 967 So.2d 550, 552 (La.Ct.App.2007). Because we have found that the evidence taken in the light most favorable to plaintiff shows the first arrest was unlawful (i.e., without probable cause), then *any* force used by the officers constituted a battery under state law.

Appendix A

3. Malicious Prosecution

Plaintiffs have also asserted a state-law claim against Marcantel alleging that he engaged in malicious prosecution in connection with the second arrest and subsequent charges. Unlike federal law, Louisiana recognizes a cause of action for malicious prosecution. *See Jones v. Soileau*, 448 So.2d 1268, 1271 (La.1984). The elements of the cause of action are: (1) the commencement or continuation of an original criminal or civil proceeding; (2) its legal causation by the present defendant in the original proceeding; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage conforming to legal standards resulting to plaintiff. *Id.*

The district court's decision to grant summary judgment on this claim was proper for the following reasons. Plaintiffs must prove that the proceeding ended in a "bona fide termination" in Deville's favor. A procedural dismissal of the charges, even if the dismissal is with prejudice, does not satisfy that element of the cause of action. *See Savoie v. Rubin*, 820 So.2d 486 (La.2002). Rather, the element requires "that the underlying litigation . . . be brought to a conclusion on the merits." *Id.* at 488. It is undisputed that the parish district attorney exercised his power to *nolle prosse* the charges, which is a procedural dismissal of the charges

without prejudice—not a bona fide termination in the defendant's favor.[10]

4. Vicarious Liability

Plaintiffs claim the Village of Turkey Creek is vicariously liable for the officers' tortious conduct. Municipalities do not enjoy special protection from vicarious liability under Louisiana law and are subject to *respondeat superior* like every other employer. *See Brasseaux v. Town of Mamou*, 752 So.2d 815 (La.2000). "Although an employment relationship may in fact exist, the employer will not be liable for the substandard conduct of the employee unless the latter can be fairly said to be within the course and scope of employment with the former." *Id.* at 820. The district court did not reach the question of whether the Village of Turkey Creek is vicariously liable, concluding that it was entitled to summary judgment because plaintiffs failed to sustain their state-law claims against the individual defendants. Because this conclusion was in error, we reverse. On remand, should the district court reach the issue of the Village of Turkey Creek's vicarious liability, it should then consider in the first instance

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10. "The district attorney has the power, in his discretion, to dismiss an indictment or a count in an indictment, and in order to exercise that power it is not necessary that he obtain consent of the court." La.Code Crim. P. 691. "Dismissal by the district attorney of an indictment or of a count of an indictment, discharges that particular indictment or count. The dismissal is not a bar to a subsequent prosecution . . . ." La.Code Crim. P. 693.

whether Marcantel and Tarver were acting within the scope of their employment such that the Village can be held liable for plaintiffs' viable state-law claims against the individual defendants.

IV. CONCLUSION

For the foregoing reasons, we reverse the district court's grant of summary judgment to defendants on the following claims: (1) the § 1983 false arrest claim against Tarver arising from the August 2005 arrest; (2) the § 1983 excessive force claims against Marcantel and Tarver arising from the August 2005 arrest; and (3) the claim against Tarver under Louisiana law for false arrest and imprisonment arising from the August 2005 arrest; (4) the claim against Marcantel and Tarver under Louisiana law for excessive force/battery; and (5) the vicarious liability claim under Louisiana law against the Village of Turkey Creek. We affirm the district court's grant of summary judgment to defendants in all other respects. Accordingly, we remand this case to the district court for further proceedings consistent with this opinion.

AFFIRMED in part; REVERSED in part; and REMANDED.

APPENDIX B — MEMORANDUM RULING OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAFAYETTE-OPELOUSAS DIVISION FILED OCTOBER 23, 2007

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civil Action No. 06-1451

Judge Tucker L. Melancon

Magistrate Judge C. Michael Hill

Michell B. Deville, et al

versus

Louis Dale Marcantel, et al.

MEMORANDUM RULING

Before the Court are Plaintiffs' Motion to Reconsider Order Dismissing State Law Claims Without Prejudice [Rec. Doc. 88] and defendants' Motions to Reconsider Order Dismissing State Law Claims Without Prejudice [Rec. Docs. 90; 92; 93].

I. Background

On September 27, 2007, after considering defendants' motions for summary judgment, *R. 40;42;44;46*, the Court

issued a Memorandum Ruling and Judgment dismissing plaintiffs' federal claims with prejudice and declining to exercise supplemental jurisdiction over plaintiffs' remaining state law claims, thus dismissing those claims without prejudice. *R. 86; 87.* In their motion to reconsider, plaintiffs request that the Court reinstate plaintiffs' state law claims and remand them to the Thirteenth Judicial District Court, Evangeline Parish, Louisiana for further adjudication. Defendants also move the Court to reinstate plaintiffs' state law claims, but to do so in order to reconsider its decision declining to exercise supplemental jurisdiction over the state law claims and dismiss those claims with prejudice.

Plaintiffs filed this action on August 24, 2006, alleging claims of false arrest, false imprisonment, malicious prosecution, excessive force, battery, conspiracy and vicarious liability under 42 U.S.C. § 1983 and state tort law. *R. 1.* The case was removed to this Court on August 30, 2006, the scheduling order issued on October 20, 2006 and the trial was scheduled for November 19, 2007. *R. 7; 22.* In light of the history of this case and because the federal and state law claims are not separate and independent causes of action, but rather involve the same set of facts and evidence, the Court will grant the parties' motions to reconsider and reinstate the state law claims. Thus, these claims will be considered under defendants' motions for summary judgment [Rec. Docs. 40, 42, 44, 46] and plaintiffs' opposition thereto [Rec. Doc. 54].

Appendix B

II. Analysis

Defendants, Louis Dale Marcantel, individually and in his official capacity as Chief of Police for the Village of Turkey Creek, Dewayne Tarver, individually and in his official capacity as a Police Officer for the Village of Turkey Creek, and the Village of Turkey Creek each request the Court to dismiss plaintiffs' state law claims with prejudice. The motions will be addressed as follows.

A. Chief Marcantel and Officer Tarver

1. False Arrest/False Imprisonment and Malicious Prosecution Claims

In Louisiana, if an arrest is made either without any legal process or warrant or under a warrant void and null upon its face, a false arrest or imprisonment has occurred. *Ross v. Sheriff of Lafourche Parish*, 479 So.2d 506, 510 (La.App. 1 Cir.,1985). However, if a person is arrested pursuant to statutory authority, there is no liability for damages for false arrest or imprisonment. *Id.* (citing *Kyle v. City of New Orleans*, 353 So.2d 969, 971 (La.1977)). In its Memorandum Ruling, the Court found that the arrests of Michell Deville were made pursuant to statutory authority and Chief Marcantel's and Officer Tarver's actions in arresting Michell Deville were not unreasonable as the totality of facts and circumstances were sufficient for a reasonable person to conclude that the plaintiff had committed or was committing one or more offenses.

Appendix B

The resolution of plaintiffs' malicious prosecution claims, turns on whether a reasonable officer in Chief Marcantel or Officer Tarver's positions could have reasonably believed he had probable cause to arrest Michell Deville.[1] In civil cases, probable cause is a standard of proof employed in defense of malicious prosecution claims. *Jenkins v. Baldwin*, 801 So.2d 485, 496 (La.App. 4 Cir., 2001) (citing *Jones v. Soileau*, 448 So.2d 1268 (La.1984)). In the absence of probable cause, the crucial determination in a malicious prosecution action is whether the defendant had an honest and reasonable belief in the guilt of the plaintiff at the time he pressed charges. *Gibson v. State*, 758 So.2d 782, 794, (La.2000)

Based on the Court's prior Memorandum Ruling that Chief Marcantel and Officer Tarver had probable cause to arrest Michell Deville and did not act unreasonably in those arrests, plaintiffs' state law claims of false arrest/imprisonment and malicious prosecution will be dismissed.

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1. The elements which must be established to prevail in a malicious prosecution action are: (1) the commencement or continuance of an original criminal or civil judicial proceeding; (2) its legal causation by the present defendant in the original proceeding; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for the original proceeding; (5) the presence of malice therein; and (6) damage resulting to the plaintiff.

Appendix B

2. Excessive Force Claims and Battery

Plaintiffs also assert that the Village of Turkey Creek officers used excessive force. Under Louisiana law, the same standard is used in analyzing a state law claim of excessive force as a constitutional claim, namely reasonableness under the circumstances.[2] *Reneau v. City of New Orleans*, 2004 WL 1497711, *4 (E.D.La., 2004) (Fallon, J) (citing *Kyle v. City of New Orleans*, 353 So.2d 969, 973 (La.1977) ("Whether the force used is reasonable depends upon the totality of the facts and circumstances in each case. A court must evaluate the officers' actions against those of ordinary, prudent, and reasonable men placed in the same position as the officers and with the same knowledge as the officers.")). As the Court has found that, under the totality of the facts and circumstances in this case, Chief Marcantel and Officer Tarver acted reasonably, plaintiffs' state law claims of excessive force must fail.

Under Louisiana law, the use of reasonable force to restrain an arrestee shields a police officer from liability

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2. Factors to consider in making a determination of whether the force used by a police officer to effect an arrest was reasonable under the circumstances include: (1) the known character of the arrestee; (2) the risks and dangers faced by the officer; (3) the nature of the offense or behavior involved; (4) the chance of escape if the particular means are not employed, (5) the existence of alternative methods of arrest or subduing the arrestee; (6) the physical size, strength and weaponry of the officers as compared to that of the arrestee; and (7) the exigencies of the moment. *Kyle v. City of New Orleans*, 353 So.2d 969 (La.1977).

for battery. As the Court has found that defendants actions were not unreasonable or excessive, plaintiffs' claims of battery will also be dismissed.

3. Conspiracy

Plaintiffs state a cause of action for civil conspiracy under state tort law. Louisiana Civil Code Article 2324(A) provides that "[H]e who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person for the damage caused by such act." The conspiracy by itself is not the actionable claim under La. Civil Code art. 2324, it is the underlying tort the conspirators agree to perpetrate and actually accomplish that constitutes the actionable element of the claim. *Barnhill v. Remington Oil and Gas Corp.*, 918 So.2d 52, 60 (La.App. 4 Cir., 2005) (citing *Ross v. Conoco, Inc.*, 828 So.2d 546, 552 (La.2002)). As the Court held in its Memorandum Ruling, plaintiffs have alleged no facts which would indicate defendants' actions were motivated by ill will towards Michell Deville. Nor have plaintiffs provided any evidence or argument to support their claims of conspiracy against Chief Marcantel or Officer Tarver. Accordingly, plaintiffs' state law conspiracy claims will be dismissed. *R. 86.*[3]

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3. Based on the Court's dismissal of plaintiffs' state law claims, Ricky Deville's derivative claim of loss of consortium must also be dismissed.

Appendix B

B. The Village of Turkey Creek

Plaintiffs allege that the Village of Turkey Creek is vicariously liable for the acts of Chief Marcantel and Officer Tarver for false arrest, false imprisonment, malicious prosecution, excessive force, battery, and conspiracy. As plaintiffs have failed to sustain these causes of action against Chief Marcantel and Officer Tarver, their claims against Village of Turkey Creek for vicarious liability must also be dismissed.

III. Conclusion

For the foregoing reasons, the motions to reconsider will be granted. Upon further consideration of the motions for summary judgment filed by all defendants as well as the motion for judgment on the pleadings filed by the Village of Turkey Creek, *R. 40, 42, 42, 46*, and plaintiffs' memoranda in opposition thereto, *R. 53, 54*, the Court will grant defendants' motions and plaintiffs' federal and state law claims will be dismissed with prejudice.

APPENDIX C — MEMORANDUM RULING OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAFAYETTE-OPELOUSAS DIVISION FILED SEPTEMBER 27, 2007

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civil Action No. 06-1451

Judge Tucker L. Melancon

Magistrate Judge C. Michael Hill

Michell B. Deville, et al

versus

Louis Dale Marcantel, et al.

MEMORANDUM RULING

Before the Court are the following motions: 1) Motion for Summary Judgment filed by defendant Officer Dewayne Tarver, individually and in his official capacity as a Police Officer for the Village of Turkey Creek [Rec. Doc. 46]; 2) Motion for Summary Judgment filed by defendant Chief Louis Dale Marcantel, individually and in his official capacity as Chief of Police for the Village of Turkey Creek [Rec. Doc. 42]; 3) Motion for Summary Judgment filed by the Village of Turkey Creek [Rec. Doc. 44]; and, 4) Motion for Judgment on

the Pleadings filed by the Village of Turkey Creek [Rec. Doc. 40]. For the following reasons, the motions for summary judgment will be granted with prejudice as to plaintiffs' federal claims and without prejudice as to plaintiffs' state law claims. The Village of Turkey Creek's motion for judgment on the pleadings will be denied.

I. Background

This matter arises out of an August 5, 2005 traffic stop of plaintiff, Michell Deville (sometimes referred to as "plaintiff"), in the Village of Turkey Creek in Evangeline Parish, Louisiana. According to plaintiff's deposition testimony, she was driving with her two and one-half year old granddaughter in a restrained car-seat in the backseat when she noticed the lights of a police car behind her. Plaintiff steered her vehicle to the right shoulder of the road and came to a stop with her engine running. At approximately 6:04 p.m., Dewayne Tarver, a Village of Turkey Creek police officer ("Officer Tarver"), walked up to plaintiff's driver's side window, informed her that she had been driving 50 m.p.h. in a 40 m.p.h zone and asked for her driver's license. Plaintiff told Officer Tarver that "it wasn't possible; [she] had [her] cruise control on 40." Officer Tarver responded, "Well, I clocked you at 50," to which plaintiff stated "it was bullshit."

After being told a second time that she was driving 50, plaintiff handed her license to Officer Tarver. Officer Tarver then requested plaintiff's vehicle registration. As she was leaning towards her glove box, "[plaintiff]

told him it was bullshit again." Office Tarver then "told [her][she] needed to step out [of her] car" and that "[He's] going to bring [her] in" because "[she's] under arrest." After being told to step out of the car, plaintiff responded, "I haven't done anything wrong," to which Officer Tarver again told her to step out of her vehicle. Plaintiff then rolled up her window and locked the doors. Officer Tarver walked back to his vehicle to call his superior, Turkey Creek Chief of Police Louis Dale Marcantel ("Chief Marcantel"). During that time plaintiff made several phone calls to family members, including her husband and son who told her they were coming to the scene.

Thereafter, Chief Marcantel, arrived at the scene and walked to Deville's vehicle. Chief Marcantel was not in his uniform but "showed [plaintiff] his badge", and then he told [her][she] needed to get the window down or he was going to break it." Plaintiff told Chief Marcantel that she was waiting for her husband to get to the scene to see about her granddaughter. Chief Marcantel subsequently broke plaintiff's driver side front window with Officer Tarver's flashlight. He then grabbed plaintiff's wrists through the window while Officer Tarver opened the driver's side door and Officer Tarver and Chief Marcantel extricated her from the vehicle. Plaintiff was placed against her vehicle and handcuffed by Officer Tarver. During the extrication and handcuffing, plaintiff attempted to use her cell phone. As plaintiff was being escorted to Officer Tarver's police car, she "fell" to the ground. Both Chief Marcantel and Officer Tarver picked plaintiff up from the ground and placed her in Officer Tarver's vehicle.

Appendix C

While driving to the sheriff's department, Officer Tarver summoned Acadian Ambulance to the station to assist plaintiff. Plaintiff refused medical treatment, telling emergency technicians that she was "okay." Plaintiff later requested medical treatment and Acadian Ambulance returned. Chief Marcantel requested blood and urine samples be taken from plaintiff and sent to the Louisiana State Police laboratory. The laboratory results were returned on April 19, 2006 and showed the presence of Phentermine and Sertraline, an anti-anxiety drug and a prescription appetite suppressant.

On June 19, 2006, plaintiff was arrested at her home by Evangeline Parish Sheriff's deputies for operating a vehicle under the influence of a Schedule IV controlled dangerous substance, Phentermine and Sertraline, and for the illegal use of a controlled dangerous substance in the presence of persons under the age of seventeen. *Evangeline Parish Warrant of Arrest no. 18125.* Subsequently, all charges against Michell Deville were Nolle Prosed by the Evangeline Parish District Attorney.

Plaintiff and her husband, Ricky James Deville,("plaintiffs") filed suit in the Thirteenth Judicial District Court for Vermillion Parish, Louisiana, on August 3, 2006 against defendants seeking damages for personal injuries and for denial of Michell Deville's civil rights. *Complaint.* On August 24, 2006, the suit was removed to this Court. [Rec. Docs. 2, 7].

Appendix C

II. Summary Judgment Standard

A motion for summary judgment shall be granted if the pleadings, depositions and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir.1994)(en banc). When a party seeking summary judgment bears the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if such evidence were uncontroverted at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). As to issues which the non-moving party has the burden of proof at trial, the moving party may satisfy this burden by demonstrating the absence of evidence supporting the non-moving party's claim. *Celotex Corp.*, 477 U.S. at 324.

Once the movant produces such evidence, the burden shifts to the respondent to direct the attention of the court to evidence in the record sufficient to establish that there is a genuine issue of material fact requiring a trial. *Id.* The responding party may not rest on mere allegations made in the pleadings as a means of establishing a genuine issue worthy of trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986); *Little*, 37 F.3d at 1075. If no issue of fact is presented and if the mover is entitled to judgment as a matter of law, the court is required to render the judgment prayed for. Fed.R.Civ.P. 56(c); *Celotex Corp.*, 477 U.S. at 322. Before it can find that there are no genuine issues of material fact, however, the court must be satisfied that no reasonable trier of fact could have found for the non-moving party. *Id.*

Appendix C

III. Analysis

Plaintiffs allege that defendants violated The Civil Rights Act of 1871, 42 U.S.C. § 1983 by depriving Michell Deville of her civil rights under the "First, Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States of America." *Complaint*, ¶ *15*. Plaintiffs specifically assert the right to be free from unreasonable search and seizure and the right to be free from the use of excessive force, false arrest, malicious prosecution and false imprisonment. Plaintiffs also allege state law claims for battery, false arrest, false imprisonment, use of excessive force, malicious prosecution, vicarious liability and conspiracy. Plaintiff, Ricky James Deville, brings a claim for loss of consortium. As all claims against the defendants arise out of the same operative facts, the Court will First address the motions for summary judgment filed by Officer Tarver, Police Chief Marcantel and the Village of Turkey Creek as to the federal claims and then address the state law claims and the motion for judgment on the pleadings filed by the Village of Turkey Creek.

A. Plaintiff's Claims Under 42 U.S.C. § 1983 Against Officer Dewayne Tarver and Police Chief Louis Dale Marcantel

The Civil Rights Act of 1871, 42 U.S.C. § 1983 provides that any person who, under color of state law, deprives another of "any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured. . . ." Section 1983 does not create any

substantive rights, but rather, it provides a remedy for the rights that it designates. *See* 42 U.S.C. § 1983 (2006); *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1573 (5th Cir.1989). "Thus, an underlying constitutional or statutory violation is a predicate to liability under § 1983." *Id.*

Plaintiffs claim that defendants violated Michell B. Deville's § 1983 civil rights to be free from unlawful seizure and arrest, excessive force, malicious prosecution and false arrest under the Fourth Amendment and the Fourteenth Amendment. There are three elements to establish liability through a Section 1983 action. *Bush v. Viterna*, 795 F.2d 1203, 1209 (5th Cir.1986). There must be (1) a deprivation of a right secured by federal law (2) that occurred under color of state law, and (3) was caused by a state actor. *Id.* "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker v. McCollan*, 443 U.S. 137, 146, (1979); *see also Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 450 (5th Cir.1994) (en banc). Claims brought under 42 U.S.C. § 1983 are analyzed according to whether the defendant is an individual or a government entity. *Monell v. Dep't of Social Services*, 436 U.S. 658, 691-92 (1978). A § 1983 claim filed against an individual must be based upon that person's actual involvement in the events giving rise to the deprivation. *Id.* Entering a judgment against both a corporation and its employee in its official capacity is improper because such a judgment would "effectively make the corporation liable for the same act." *Sims v. Jefferson Downs Racing Assoc*, 778 F.2d 1068, 1081 (5th Cir.1985)

Appendix C

1. Official Capacity Claims Against Officer Tarver and Chief Marcantel

Plaintiffs allege that Officer Tarver and Chief Marcantel are liable in their official capacities. A suit against a municipal official in his official capacity is tantamount to a suit against the municipality. *Hafer v. Melo*, 502 U.S. 21 (1991). The municipality may be held liable on account of the unconstitutional conduct by the official only if the entity's policy or custom played a part in the violation of the plaintiff's rights. *Id.*

Defendants maintain that the Village of Turkey Creek is a "Lawrason Act" municipality which is governed by a "mayor-board of alderman" form of government pursuant to La. R.S. 33:321. *Aff. Of Janet, Mayor of Village of Turkey Creek.* Because the police department is dependent upon the municipality, the Village of Turkey Creek is the appropriate "Official Capacity Defendant." *R. 42, 44, 46.*

Plaintiffs do not address the official capacity claims in their opposition, nor do they address defendants' argument as to Officer Tarver and Chief Marcantel. Rather, plaintiffs concede that Turkey Creek is the appropriate entity to be sued as the official capacity defendant and contend in their opposition that the Village of Turkey Creek "apparently required no training of its officers and took no action to curb their behavior." *R. 53.*

Plaintiffs claims against Officer Tarver and Chief Marcantel in their official capacities will therefore be dismissed and the plaintiffs' claims against Officer Tarver and Chief Marcantel, in their individual capacities, and the Village of Turkey Creek will be addressed in turn.

2. *Individual Capacity Claims Against Officer Tarver and Chief Marcantel*

State actors are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). An important factor in affording public officials the protections of qualified immunity is the policy of not deterring officials from fully discharging their professional duties. *Pierson v. Ray*, 386 U.S. 547, 555 (1967). "One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). "Balanced against these concerns is the right of injured persons to receive redress for a violation of their constitutional rights, with the threat of monetary damages operating to deter public officials from violating citizens' constitutional rights." *Sanchez v. Swyden*, 139 F.3d 464, 468 (5th Cir.1998) (citations omitted).

Both Officer Tarver and Police Chief Marcantel raise the defense of qualified immunity. The question of

qualified immunity involves a two step inquiry. First, a court must determine whether plaintiff has alleged a violation of a clearly established right. *See Siegert v. Gilley*, 500 U.S. 226, 231-33 (1991). Second, the court must determine whether the officer's conduct was objectively reasonable in light of the legal rules applicable at the time of the alleged violation. *Id.* The inquiry is conducted without regard for the law enforcement officer's actual state of mind or subjective motivations. Instead, the court attempts to put itself "in the shoes of a reasonable police officer as he or she approaches a given situation and assesses the likelihood of danger in a particular context." *Fontenot v. Cormier*, 56 F.3d 669, 673 (5th Cir.1995) *citing United States v. Rideau*, 969 F.2d 1572, 1574 (5th Cir.1992)(en banc). An officers' actions are objectively unreasonable where no reasonably competent officer would find probable cause to arrest the plaintiff *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir.2000). "On the other hand, 'if officers of reasonable competence could disagree on this issue, immunity should be recognized.'" *Id.* (citations omitted).

a. Individual Claims Against Officer Tarver

i. Unlawful Arrest

Plaintiffs allege that Officer Tarver's arrest of Michell Deville amounted to an unlawful seizure and that he used excessive force in effecting his arrest. The Fourth Amendment bestows the constitutional right upon a person to be free from unreasonable seizures of both his person and effects. "In order to make a

warrantless arrest in a public place, the arresting officer must have probable cause to believe that the suspect has committed, is committing, or is about to commit a crime." *Fontenot v. Cormier*, 56 F.3d 669, 674 (5th Cir.1995) (citing *Harper v. Harris County*, 21 F.3d 597, 601 (5th Cir.1994)). "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater*, 195 F.3d 242.

In *Atwater*, a motorist arrested for her failure as well as that of her children to wear seat belts, brought civil rights claims against the arresting officer. The arresting officer asserted the defense of qualified immunity. The Fifth Circuit held that the officer was not entitled to the defense because the seizure was objectively unreasonable. *Id.* at 388-89. The Fifth Circuit later granted rehearing *en banc*. On rehearing, the court upheld summary judgment in the officer's favor, concluding that the arrest was reasonable under the Fourth Amendment because the officer had probable cause to arrest the motorist for the seat belt violations. The United States Supreme Court affirmed the Fifth Circuit's *en banc* ruling. *See Atwater v. City of Lago Vista*, 195 F.3d at 245-46 (5th Cir.1999) (en banc), *affirmed by Atwater*, 532 U.S. 318, 354 (U.S.2001) (An officer may arrest an individual without violating the Fourth Amendment if there is probable cause to believe that the offender has committed even a very minor criminal offense in the officer's presence.).

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In the case *sub judice*, Louisiana Revised Statute 32:391 provides that officers are authorized to perform a full custodial arrest when a traffic violator refuses to sign the ticket and summons.[1] Louisiana Revised Statute 14:108 provides,

"Resisting an officer is the intentional interference with, opposition or resistance to, or obstruction of an individual acting in his official capacity and authorized by law to make a lawful arrest, lawful detention, or seizure of property or to serve any lawful process or court order when the offender knows or has reason to know that the person arresting, detaining, seizing property, or serving process is acting in his official capacity."

The undisputed evidence shows that Officer Tarver initially stopped plaintiff on suspicion of driving 50 m.p.h. in a 40 m.p.h. zone. Plaintiff confirms that she responded to Tarver's requests for her driver's license and registration with the remark that "it was bullshit" and that she refused to exit her vehicle when Tarver

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1. La. R.S.32:931(B) provides in pertinent part:

> If the person arrested holds a Louisiana operator's license and gives his written promise to appear at the time and place stated, the officer may release him from custody. . . . Any such person refusing to give the written promise to appear shall be taken immediately by the arresting officer before the nearest or most accessible magistrate having jurisdiction.

requested that she do so. *M. Deville*, pp. 47-48. Upon telling plaintiff he would have to "bring her in" if she didn't cooperate, plaintiff rolled up her window, left her locked car running and called her husband and son to come to the scene. *Id.*, pp. 49-52. The record provides that when plaintiff continually refused to exit her vehicle, Officer Tarver went to his police vehicle to write her a ticket. Plaintiff refused to sign the ticket and told Officer Tarver her husband and son were on their way. *Tarver*, p. 42. Tarver stated he was aware that plaintiff was "irate and out of control" and had a young child in the back seat and did not attempt to force plaintiff out of her car.[2] *Id.* Instead he called his superior, Chief Marcantel, through the police dispatcher to assist him at the scene. *Id.*, pp. 42-46. When Chief Marcantel arrived, plaintiff continued to refuse to exit her vehicle or roll down her window and had to be physically extricated before Officer Tarver placed her under arrest.[3] *Id.* A witness to the incident stated that after plaintiff was physically taken out of her vehicle Officer Tarver and Chief Marcantel escorted her to the police car during which she appeared to continue to resist arrest and then "just dropped—sat down on them." *Chaddrick*, pp. 11-19.

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2. Officer Tarver testified that plaintiff told him she "wasn't signing a fucking thing."

3. The deposition testimony of Officer Tarver and Chief Marcantel indicate that plaintiff said "fuck you" and tried to put her vehicle into gear during her extrication. *Tarver Depo.*, pp. 51-52; *Marcantel Depo.*, pp. 41-45.

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Based on the authority in *Atwater*, Officer Tarver had probable cause to believe that plaintiff committed a crime in his presence. Whether a search or seizure is "extraordinary" turns, above all else, on the manner in which it is executed. *See Atwater*, 532 U.S. at 354(citing *Tennessee v. Garner*, 471 U.S. 1(1985); ("seizure by means of deadly force"), *Wilson v. Arkansas*, 514 U.S. 927(1995) ("unannounced entry into a home"); *Welsh v. Wisconsin*, 466 U.S. 740 (1984) ("entry into a home without a warrant"); and *Winston v. Lee*, 470 U.S. 753(1985) ("physical penetration of the body")). The Court concludes that the foregoing statutes as well as the totality of the facts and circumstances outlined above, including the lack of evidence that Officer Tarver conducted the arrest in an "extraordinary manner," were sufficient for a reasonable person to conclude that Michell Deville had committed or was committing an offense, and therefore, Officer Tarver did not violate her Fourth Amendment rights in making the arrest.

White plaintiffs also contend that Officer Tarver's actions were part of a conspiracy against Michell Deville, they have provided no evidence nor even an argument to support their claim. Plaintiffs have alleged no facts which would indicate Tarver's actions were motivated by some ill will towards Michell Deville. Instead, plaintiff stated in her deposition testimony that she believed Tarver was in good faith when he stopped her. Plaintiffs' also allege in their Complaint that Officer Tarver violated Michell Deville's Fourth Amendment rights when she was arrested on June 19, 2006. In their opposition to the motions for summary judgment,

plaintiffs admit that "to this point, discovery has not uncovered any involvement on the part of Dewayne Tarver in the arrest of June 13, 2006 and that the claims against Tarver arising from the June 13, 2006 arrest should be dismissed." *R. 54, p. 9.* Accordingly, plaintiffs' claim of conspiracy against Officer Tarver as well as the claims arising from the June 13, 2006 arrest will be dismissed.

ii. Excessive Force

Plaintiffs' excessive force claim centers on whether or not Officer Tarver used excessive force when he assisted Chief Marcantel in extricating Michell Deville from the vehicle, placed her against the vehicle and secured her handcuffs. In *Graham v. Conner*, 490 U.S. 386 (1989), the United States Supreme Court held that where the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment and its reasonableness standard, rather than under a substantive due process approach.[4] *Id.* at 394-95. "When examining the propriety of qualified immunity from excessive force claims, the Court is faced with the unusual circumstance that

4. "Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons ... against unreasonable ... seizures" of the person." *Graham v. Connor*, 490 U.S. 386, 394 (1989).

the standard for stating a claim, the objective reasonableness of the force exerted, coincides in large part with the inquiry for determining qualified immunity, the objective reasonableness of the officers' conduct." *Heitschmidt v. City of Houston*, 161 F.3d 834, 839 (5th Cir.1998). Under *Graham*, the relevant factors for determining the objective reasonableness of the officer's conduct include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 626 (5th Cir.2006)(citing *Graham*, 490 U.S. at 396).

Applying the foregoing standards to the case at bar, including the relevant factors of *Graham*, the Court finds that Officer Tarver's actions in restraining and handcuffing Michell Deville were not objectively unreasonable. The record is undisputed that plaintiffs arrest occurred after her repeated refusal to comply with Officer Tarver's requests as well as her refusal to exit her locked vehicle. Plaintiff concedes that she continued to refuse to get out of the vehicle when Chief Marcantel arrived at the scene and that after Chief Marcantel broke her window to arrest her, she continued to resist the arrest and tried to use her cell phone while Officer Tarver placed her in handcuffs. *M. Deville*, p. 60. Officer Tarver testified, and plaintiff does not dispute, that he checked to make sure the handcuffs were not too tight and that plaintiff never complained that they were too tight. *Id.*, pp. 52-53, 104-05; *Tarver* p. 52.

Appendix C

Plaintiffs allege that Michell Deville was injured when defendants pulled her out of the vehicle through the door and put her against the vehicle to handcuff her. Plaintiff stated in her deposition that she fell down on the way to the police unit because her abdomen was injured when defendants "threw her" against her car. Contrary to plaintiff's deposition testimony, the testimony of Officer Tarver and of Chief Marcantel provides that they "placed her against the car" without shoving her in order to handcuff her, and that on the way to the police unit plaintiff just "sat down". *Tarver*, pp. 51-53; *Marcantel*, pp. 52-53. The record supports defendants' testimony. A witness to the incident states that plaintiff appeared to be resisting arrest and that she "just sat down" when defendants were "helping her to . . . the deputy car." *Chaddrick*, pp. 11, 17. The witness further states that defendants appeared to be "trying to cradle" plaintiff as they were assisting her into the police unit. *Id.* As to her alleged abdominal injury, plaintiff admits that she refused the medical assistance offered by Acadia Ambulance when she arrived at the sheriff's station. The initial medical record confirms plaintiff's refusal of treatment and notes that she "denies pain no obvious trauma noted in the abdomen/ pelvis." *Acadian Amb. Medical Rec. # 1.* Upon Acadian Ambulances's return, the medical record provides "Abdomen / Pelvis non distended denied n/v denies pain no obvious trauma." *Acadian Amb. Medical Rec. # 2.*

To state a claim for excessive use of force, the plaintiffs asserted injury must be more than *de minimis*. *Freeman v. Gore*, 483 F.3d 404, 416 (5th

Cir.2007) (internal citations omitted). Assuming *arguendo* that plaintiff's alleged injuries were more that *de minimis*, the Court concludes as a matter of law that Officer Tarver's actions were objectively reasonable in that he used reasonable force in the arrest of Michell Deville in a situation which could have escalated to a serious situation with an individual who could have posed an immediate threat to the safety of Officer Tarver, herself and her grandchild while she was actively resisting arrest. *Freeman v. Gore*, 483 F.3d 404 (5th Cir.2007)(Probable cause to arrest an individual who could have "stir[red] up [a] potentially explosive situation")(citing *Huang v. Harris County*, 264 F.3d 1141 (5th Cir.2001)). Accordingly, the Court will dismiss plaintiffs' claim of excessive force against Officer Tarver.

iii. Malicious Prosecution

In *Castellano v. Fragozo*, 352 F.3d 939, 953-954 (5th Cir.2003), the Fifth Circuit held that " 'malicious prosecution' [or false arrest] standing alone is no violation of the United States Constitution, and that to proceed under § 1983 such a claim must rest upon a denial of rights secured under federal and not state law." *Id.* "The initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection—the Fourth Amendment if the accused is seized and arrested, for example, or other constitutionally secured rights if a case is further pursued. Such claims of lost constitutional rights are for violation of rights locatable in constitutional text, and some such claims may be made under 42 U.S.C.

§ 1983. Regardless, they are not claims for malicious prosecution and labeling them as such only invites confusion." *Id.*

Plaintiffs argue that because the criminal charges were *nolle prosequi* by the District Attorney against Michell Deville the Court should sustain their claims of malicious prosecution. Plaintiffs' claim for malicious prosecution, however, must be analyzed under the Fourth Amendment. *Taylor v. Gregg*, 36 F.3d 453, 455-56 (5th Cir.1994) (an action which permits the arrest and prosecution to be deemed a nullity [i.e. *nolle prosequi*] do not terminate in favor of the accused). As the Court has held that Officer Tarver had probable cause to arrest plaintiff and was not objectively unreasonable in his actions, plaintiffs' claim for malicious prosecution must also be dismissed.

3. Individual Claims Against Chief Marcantel

Plaintiffs allege that Chief Marcantel's arrest of Michell Deville on August 5, 2005 and subsequent arrest on June 19, 2006 amounted to unlawful seizures, that he used excessive force in effecting the first arrest and that he is liable for malicious prosecution and conspiracy in connection with the arrests. Plaintiffs also allege violations under the First and Ninth Amendments and 42 U.S.C. §§ 1985 and 1986. Chief Marcantel asserts the defense of qualified immunity to the § 1983 claims and maintains that plaintiffs have no right of action under the First and Ninth Amendments nor under §§ 1985 and 1986.

Appendix C

a. Unlawful Arrests

Based on the Court's analysis as set out above, plaintiff's arrests failed to violate her Fourth Amendment rights and were therefore constitutional. Assuming *arguendo* that plaintiffs allege that Chief Marcantel's part in the initial arrest was separate from plaintiffs arrest by Officer Tarver, the Court will analyze both arrests under a qualified immunity standard. Thus, the issue before the Court is whether, when viewed objectively, the facts and circumstances surrounding Michell Deville's arrests support that Chief Marcantel's conduct was objectively reasonable. *Fontenot v. Cormier*, 56 F.3d 669, 673-674 (5th Cir.1995).

August 5, 2005 Arrest

Chief Marcantel's involvement in the August 5, 2005 arrest of Michell Deville began when he arrived at the scene after Officer Tarver called him for assistance. Upon assessing the situation Chief Marcantel broke plaintiff's driver's side window with a flashlight in order to secure the plaintiff Thereafter, the two officers removed plaintiff from her vehicle, effectuated her arrest and placed her in the police car.

The Court's analysis in finding that Officer Tarver's conduct in making the arrest was objectively reasonable also applies to Chief Marcantel's conduct. The Court finds that Chief Marcantel actions were not unreasonable as the totality of facts and circumstances within his knowledge at the moment of arrest were

sufficient for a reasonable person to conclude that the plaintiff had committed or was committing one or more offenses. Chief Marcantel had reason to believe that the situation could have escalated to a more serious one in that plaintiff was obviously very upset and seemed to be acting irrationally by refusing to open her locked door or cooperate with the officers, sitting in her vehicle with the engine running and with a small child and calling her husband and son to come to the scene.

The same reasoning as that discussed in plaintiffs' conspiracy theory against Officer Tarver applies to plaintiffs' conspiracy theory against Chief Marcantel. The Court finds that Chief Marcantel had probable cause to believe he had authority to arrest Michell Deville and plaintiffs have failed to assert a claim for conspiracy against him. Thus, plaintiffs' claims against Chief Marcantel for illegal arrest and conspiracy as to the August 5, 2005 arrest will be dismissed.

June 19, 2006 Arrest

In contrast to the August 5, 2005 arrest, the June 19, 2006 arrest of plaintiff was pursuant to an arrest warrant. Given this fact, Deville must demonstrate a genuine issue of material fact exists as to whether the defendant knowingly provided false information to secure the arrest warrant or gave false information in reckless disregard of the truth. *Freeman v. County of Bexar*, 210 F.3d 550, 553 (5th Cir.2000). Plaintiffs must therefore attack the validity of the warrant in order to pierce Chief Marcantel's claim of qualified immunity.

Appendix C

The evidence establishes that after the initial arrest, Chief Marcantel contacted Acadian Ambulance to meet plaintiff at the sheriff's station. Upon arriving, the medical personnel filled out a record indicating that Michell Deville refused medical assistance, that she was on no medications and was not under the care of any physicians. *Acadian Ambulance Rep. # 1.* Chief Marcantel testified that he heard plaintiff tell Acadian Ambulance personnel that she was not on medications. *Marcantel*, p. 102. At that time he requested that plaintiff be subjected to blood and urine testing while in police custody. The results of the urine toxicology test from the Louisiana State Crime laboratory were returned on April 19, 2006 and showed the presence of Phentermine and Sertraline, an anti-anxiety drug and a prescription appetite suppressant. Chief Marcantel swore out an Affidavit on May 18, 2006 which was presented to Justice of the Peace, A.C. "Robin" Tatman, Jr., who signed a valid Warrant of Arrest for the charges of violation of La. R.S. 14:98(C), operating a vehicle while under the influence of any controlled dangerous substance listed in Schedule I, II, III, IV, or V; and La. R.S. 14:91.13, illegal use of controlled dangerous substances in the presence of persons under seventeen years of age.

To overcome the Chief Marcantel's claim of qualified immunity, plaintiffs must "demonstrate an issue of material fact as to whether any reasonably competent officer possessing the information that each officer had at the time he swore his affidavit could have concluded that a warrant should issue." *Freeman*, 210 F.3d at 553.

If officers of reasonable competence could disagree on this issue, defendants are entitled to qualified immunity. *Id.* at 554.

Plaintiffs have failed to offer any evidence which would indicate that Chief Marcantel relied upon information other than that contained within the police department's investigation file. The information in the file, standing alone, would support the conclusion that probable cause existed to believe that plaintiff had committed the offense of using controlled substances. The only conclusion one can reach from this fact is that Chief Marcantel's decision was based solely on the Acadian Ambulance record and the urine toxicology results, a decision which, as a matter of law, is not in reckless disregard of the truth. Chief Marcantel's affidavit in support of his application for plaintiff's arrest warrant included nothing more than the information which was available in the department file and plaintiffs have offered no evidence which would indicate the information was false.

The test for qualified immunity is objective reasonableness. The subjective belief of the defendant is for the most part irrelevant. *See Pfannstiel v. City of Marion*, 918 F.2d 1178, 1187 (5th Cir.1990)(holding that even an officer who subjectively intends to act unreasonably is entitled to immunity if his actions are objectively reasonable). The Court finds that Chief Marcantel's actions involving the June 19, 2006 arrest of Michell Deville were objectively reasonable and will dismiss plaintiffs' false arrest claim.

b. Excessive Force

Plaintiffs claim Chief Marcantel used excessive force when he broke plaintiffs driver side window, extricated her from her vehicle and "threw her" against her vehicle in order to effect her arrest. To prevail on an excessive force claim, a plaintiff must establish: "(1) injury (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Freeman v. Gore*, 483 F.3d 404, 416 (5th Cir.2007) (internal citations omitted). To state a claim for excessive use of force, the plaintiffs asserted injury must be more than *de minimis*. *Id.* Plaintiffs assert that Michell Deville suffered an injury to her head when broken glass lacerated her scalp, injury to her right wrist and hand when she was handcuffed and injury to her abdomen when she was placed against her vehicle to be handcuffed.

The undisputed record reveals that plaintiff refused medical treatment upon arriving at the sheriff's station. After she was jailed and her husband arrived, she requested medical treatment and Acadian Ambulance returned. The initial report states that Michell Deville had a "lac[eration] to top it(sic) scalp, no bleeding noted, only a little dry blood, no crepitus noted." Upon the return of Acadian Ambulance the report stated "1/2 in[ch] lac[eration] to lt side of forehead in hairline minor hemorrhage controlled prior to ems arrival no crepitus denies HA [headache] denies dizziness." As cited in the excessive force claim against Officer Tarver,

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Acadian Ambulance's Medical Record indicates no trauma to plaintiffs abdomen. Assuming *arguendo* that plaintiff suffered more than a *de minimis* injury, the Court will determine whether Chief Marcantel's actions were excessive and objectively unreasonable.

When Chief Marcantel arrived at the scene on August 5, 2005 he encountered a volatile situation in which plaintiff, who was obviously very upset and emotional, was locked in her vehicle with a small child, was actively refusing to cooperate with Officer Tarver, was resisting arrest and had called her husband and son to come to the scene. Chief Marcantel stated in his deposition that he approached plaintiffs vehicle, showed her his badge and identification and told her she was under arrest and to get out of the vehicle. *Marcantel Depo.*, pp. 47-58. He further stated that when he approached the vehicle plaintiff was cursing and the child was screaming and crying. *Id.* At that point, Chief Marcantel used Officer Tarver's flashlight to break plaintiffs driver side window and reached into the vehicle to secure plaintiff's hands. *Id.* Officer Tarver then opened the driver door and the two men removed plaintiff from the vehicle as she struggled against them. *Id.*, pp. 48-51. In order to assist Officer Tarver place the handcuffs on plaintiff, Chief Marcantel stated that he held her against the vehicle where she continued to struggle against him. *Id.*

The reasonableness of official use of force turns on "a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment

interests against the countervailing governmental interests at stake." The relevant factors "include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. Applying these standards to the undisputed circumstances, the Court finds that Chief Marcantel's actions in breaking the window in order to arrest Michell Deville as she was actively resisting arrest, removing her from the vehicle and placing her against the vehicle to restrain and handcuff her, were reasonable use of official force under the existing circumstances. *Martinez-Aguero* at 459 F.3d 626 (factors to consider in excessive force claim are "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."). Accordingly, plaintiffs excessive force claims against Chief Marcantel will be dismissed.

iii. Malicious Prosecution Claims

Based on the Court's holding that Chief Marcantel had probable cause to arrest plaintiff on August 5, 2005 and on June 19, 2006 and was not objectively unreasonable in his actions related to either arrest, plaintiffs' claim for malicious prosecution must also be dismissed. While plaintiff alleges without any evidentiary support that Chief Marcantel "was trying to do whatever he could to re-arrest [plaintiff] (possibly in retaliation for her complaint and retention of an attorney), the Fifth

Circuit has held, "an officer who acted with malice in procuring the warrant or the indictment will not be liable if the facts supporting the warrant or indictment are put before an impartial intermediary such as a magistrate or a grand jury, for that intermediary's independent decision breaks the causal chain and insulates the initiating party." *Taylor v. Gregg*, 36 F.3d 453, 457 (5th Cir.1994). Plaintiffs' malicious prosecution claims against Chief Marcantel will be dismissed.

B. Plaintiffs' Claims Under the First and Ninth Amendments

Plaintiffs do not specifically address their First Amendment claims against defendants. *R.I.* In their opposition to the motions for summary judgment, plaintiffs state that defendants' actions "terrorized [plaintiff], causing her to lock her doors, fear law enforcement, and fear driving"[5], and allege that Chief Marcantel retaliated against her for bringing the instant suit when he arrested her on August 5, 2006. *Id.* 54.

The First Amendment prohibits not only direct limits on individual speech but also adverse governmental action against an individual in retaliation for the exercise of protected speech activities. *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir.2002). To establish a First

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5. The deposition testimony of plaintiff's husband, Ricky Deville, states that he "guesses" plaintiff is afraid of law enforcement personnel, but points to no substantiated incidents as a result of the alleged fear. *Depo. Of R. Deville*, pp. 47-50.

Amendment retaliation claim, plaintiffs must establish that (1) Michell Deville was engaged in constitutionally protected activity, (2) the defendants' actions caused her to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiff's exercise of constitutionally protected conduct. *Id.*

Even construing the allegations in a light most favorable to plaintiffs, they have failed to establish a violation of the First Amendment. Plaintiffs have produced absolutely no evidence that the arrests were motivated by retaliation or that Michell Deville suffered an injury that would chill a person of ordinary firmness from continuing to trust law enforcement or drive without fear. "[S]ome retaliatory actions—even if they actually have the effect of chilling the plaintiff's speech—are too trivial or minor to be actionable as a violation of the First Amendment." *Keenan*, 290 F.3d at 258. Accordingly, plaintiffs' First Amendment claims will be dismissed.

Nor can plaintiffs establish Ninth Amendment claims against defendants. The Ninth Amendment to the United States Constitution states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Hence, the Ninth Amendment does not provide an action for a civil rights violation. In *Richardson v. Sewerage & Water Bd.*, 1996 WL 288275, *2 (E.D.La., 1996), Judge Scar considered a Ninth Amendment claim

in a case involving alleged § 1983 violations. The court held, "The Ninth Amendment is not a vehicle for bringing civil rights claims. Simply put, [plaintiff's] allegations of Ninth Amendment violations fail to state a claim for which relief can be granted pursuant to 42 U.S.C. § 1983. *See Charles v. Brown*, 495 F.Supp. 862, 863 (N.D.Ala.1980); *see also Canton Branch, N.A.A.C.P. v. Runnels*, 617 F.Supp. 607, 609 n. 3 (S.D.Miss.1985)." As plaintiffs have presented nothing in their Complaint or their objections, by way of factual or legal argument, which warrants a contrary conclusion, their Ninth Amendment claims against Chief Marcantel will be dismissed.

D. Plaintiffs' Claims Under 42 U.S.C. §§ 1985 and 1986

Plaintiffs have raised no allegations or provided no evidence of claims under §§ 1985 and 1986. Under § 1985, conspiracy to interfere with civil rights, the plaintiffs "must prove a discriminatory animus based on race or some other inherited or immutable class characteristic such as gender, religion or national origin or based upon political association or beliefs." *Galloway v. State of Louisiana*, 817 F.2d 1154, 1159 (5th Cir.1987). The Court has found that plaintiffs' conspiracy claim must fail and in their memoranda in opposition to defendants' motions, plaintiffs concede that this matter is not based on a "discriminatory animus." Accordingly, plaintiffs' § 1985 claim and related § 1986 claim will be dismissed.

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E. Village of Turkey Creek

Plaintiffs' allegations against the Village of Turkey Creek include violations under 42 U.S.C. § 1983, 1985 and 1986. For the foregoing reasons, plaintiffs have failed to establish these actions and they will therefore be dismissed against the Village of Turkey Creek.

"Section 1983 offers no *respondeat superior* liability. Municipalities face § 1983 liability 'when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury. . . .' *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 694 (1978). Proof of municipal liability sufficient to satisfy *Monell* requires: (1) an official policy (or custom), of which (2) a policy maker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy (or custom). *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir.2001)." *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir.2002).

In their opposition, plaintiffs contend that "Turkey Creek apparently required no training of its officers and took no action to curb their behavior. . . ." *R. 54.* Plaintiffs allege in their complaint, (1) improper training; (2) improper supervision; (3) "inadequately and improperly investigate citizen complaints of police misconduct; and (4) "[c]ondoning and allowing unlawful and unconstitutional police behavior misconduct."

Appendix C

Under certain circumstances, a municipality may incur § 1983 liability for its employees' acts when a municipal policy of hiring or training causes those acts.[6] In order to prove that a municipal hiring or training policy violated her rights under § 1983, plaintiff must show that (1) the training or hiring procedures of the municipality's policymaker were inadequate; (2) the municipality's policymaker was deliberately indifferent in adopting the hiring or training policy; and (3) the inadequate hiring or training policy directly caused the plaintiff's injury. *Benavides v. County of Wilson*, 955 F.2d 968, 972 (5th Cir.1992).

A municipality acts with "deliberate indifference" in adopting an otherwise constitutional policy if "in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in violations of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.*, (quoting *Wassum v. City of Bellaire, Texas*, 861 F.2d 453, 456 (5th Cir.1988) (plaintiff must show that hiring practice constituted "gross negligence amounting to conscious indifference to the welfare of the public")).

Plaintiffs point to no evidence of inadequate hiring and training nor of inadequate supervision of Officer

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6. The Court will assume *arguendo* that the Village of Turkey Creek had the authority to require the officers to attend "adequate" training despite its designation as a "Lawrason Act" municipality. *See, supra.*

Tarver or Chief Marcantel. Mere proof that the injury could have been prevented if the officer had received better or additional training cannot, without more, support liability. *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (Fifth Cir.2005). Plaintiffs have not presented a soupcon of such evidence. The undisputed record indicates that both officers were P.O.S.T. certified in 2005 in accordance with La. R.S. 40:2401, *et seq.* Further, plaintiffs have "nothing but their own allegations to establish that [the officers'] training was so obviously inadequate that [the Village of Turkey Creek] was deliberately indifferent in not improving it . . . [C]onclusory allegations of . . . grossly inadequate training do not make out a case of a deliberately indifferent policy." *Benavides v. County of Wilson*, 955 F.2d 968, 973 -974 (5th Cir1992). Finally, plaintiffs have no evidence to show that the alleged constitutional violations would not have occurred had the allegedly inadequate training policy and supervision been some how different. For liability to attach, a plaintiff must allege with specificity how a particular training program [or supervision] is defective. *Roberts* at 293.

As to the claims for improper investigation of citizen complaints and condoning unconstitutional police behavior, plaintiffs have provided no instances where citizens complained of similar conduct or where "unconstitutional police behavior" occurred in the

absence of such complaints.[7] Moreover, plaintiffs have no evidence to show that the Village of Turkey Creek had a policy or custom of violating any civil rights, much less any facts to show that any such policy or custom was the "moving force" behind the alleged constitutional violations. Plaintiffs' § 1983 claims against the Village of Turkey Creek will be dismissed.

F. Village of Turkey Creek's Motion for Judgment on the Pleadings as to Plaintiffs' State Law Claims

Although 28 U.S.C. § 1367 confers supplemental jurisdiction over plaintiffs' state law claims, the assertion of supplemental jurisdiction may be declined if all claims over which the Court has original jurisdiction are dismissed. 28 U.S.C. § 1367(3). "When a court dismisses all federal claims before trial, the general rule is to dismiss any pendent claims. However, the dismissal of the pendent claims should expressly be without prejudice so that the plaintiff may re-file his claims in the appropriate state court." *Bass v. Parkwood Hosp.*, 180 F.3d 234, 246 (5th Cir.1999). "The Supreme Court in *United Mine Workers of America v. Gibbs*, emphasized that '[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of the applicable law.' " *Noble v. White*, 996 F.2d 797,799 (5th Cir.1993) (citation omitted).

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7. In her deposition testimony, Michell Deville stated that she "had heard" of an incident where Officer Tarver asked a male driver to get out of his car. *Plaintiff's Depo*, pp. 12-13.

Because plaintiffs' federal claims will be dismissed by this ruling, the Court will not have original jurisdiction over their remaining state law claims.

Accordingly, the Court will dismiss plaintiffs' state law claims without prejudice and will deny the motion for judgment on the pleadings which applies only to plaintiffs' state law claims.

IV. Conclusion

For the foregoing reasons, the Court will grant defendants' motions for summary judgment in part and dismiss plaintiffs' federal law claims with prejudice. Additionally, as the Court will not exercise its supplemental jurisdiction over plaintiffs' state law claims, the Court will deny defendants' motions for summary judgment in part and dismiss the state claims without prejudice. Thus, the Village of Turkey Creek's motion for judgment on the pleadings as to plaintiffs' state law claims will be denied.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED OCTOBER 9, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-31049

MICHELL B. DEVILLE; RICKY JAMES DEVILLE

Plaintiffs - Appellants

v.

LOUIS DALE MARCANTEL, individually and in his official capacity as Chief of Police of the Village of Turkey Creek, Louisiana; DEWAYNE TARVER, individually and in his official capacity as a duly commissioned law enforcement officer of the Village of Turkey Creek, Louisiana

Defendants - Appellees

Appeal from the United States District Court for the Western District of Louisiana, Lafayette

ON PETITIONS FOR REHEARING EN BANC

(Opinion _____, 5 Cir., _____, _____, F.3d _____)

Before KING, DENNIS, and ELROD, Circuit Judges.

Appendix D

(X) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ James L. Dennis
United States Circuit Judge

APPENDIX E — SUPPLEMENTAL AUTHORITIES DATED MAY 20, 2009

BORNE & WILKES, L.L.P.
Attorneys at Law

May 20, 2009

Clerk of Court
Fifth Circuit Court of Appeal
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: Michell Deville, et al.
vs.
Louis Dale Marcantel, et al.
No. 07-31049

Dear Sirs:

Pursuant to FRAP 28 (j) Citation of Supplemental Authorities, and Fifth Circuit Rule 28.4, defendant, Chief Louis Dale Marcantel, submits the following supplemental authority in support of his previously filed Petition of *En Banc* Rehearing. We are providing the Court with 21 copies of this letter as well as all counsel of record.

Chief Louis Dale Marcantel respectfully directs this Honorable Court to Louisiana Code of Criminal Procedure art. 224, which states:

> In order to make an arrest, a peace officer, who has announced his authority and purpose,

> ***may break open an outer or inner door or window of any vehicle, . . . where the person to be arrested is or is reasonably believed to be, if he is refused or otherwise obstructed from admittance. . . .***

(Emphasis ours). It is respectfully submitted this statutory authority provides Chief Marcantel with lawful authority to break plaintiff's window to effectuate her lawful arrest under Louisiana Law. This statute provides additional support to the arguments and authorities cited in Chief Marcantel's Petition for Rehearing *En Banc*. See Chief Marcantel's Petition at pgs. 7, 9, 10, 11, and 13. It is undisputed Chief Marcantel announced his authority and identified himself (by showing his badge and identification) to the plaintiff before extracting her from the vehicle. It is also undisputed Chief Marcantel was "refused or otherwise obstructed from admittance" by plaintiff's refusal to roll down her window or unlock and open her door even after the Chief identified himself. The clear wording of the statute establishes Chief Marcantel's actions were neither objectively unreasonable under Louisiana State Law nor objectively unreasonable under United States Supreme Court jurisprudence. Since Chief Marcantel was reasonable in his reliance on Officer Tarver's recitation of the facts of the case, Chief Marcantel was found to have qualified immunity for plaintiff's August 5, 2005, arrest. Plaintiff's arrest by Chief Marcantel was reasonable; thus, the Chief had lawful authority under La. C.Cr.P. art. 224 to utilize the force he did to effectuate

the plaintiff's arrest. Thus, the full Court, *En Banc*, should review the decision of the Original Panel.

Cordially,

s/ John F. Wilkes, III
JOHN F. WILKES, III

(2) (2)

No. 09-755; 09-817

SUPREME COURT, U.S.
MAR 5 - 2010

IN THE

Supreme Court of the United States

LOUIS DALE MARCANTEL, individually and in his official capacity as Chief of Police of the Village of Turkey Creek,

Petitioner,

and

DEWAYNE TARVER, individually and in his official capacity as Duly Commissioned Officer by the Village of Turkey Creek,

Petitioner,

v.

MICHELL B. DEVILLE and RICKY JAMES DEVILLE,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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SUMMARY OF THE ARGUMENT

Both Writ Applications filed by Petitioners Louis Dale Marcantel and Dewayne Tarver are based on contradicted facts and both should be denied.

This case involves a forty-five year old registered nurse and grandmother, Michell Deville, with no criminal record, who was stopped for an alleged speeding violation in the Turkey Creek, Louisiana. Petitioner Tarver alleges that Michell Deville was speeding on August 5, 2005. However, her testimony refutes that of Dewayne Tarver (who did not "lock in" the speed on his radar gun). Defendants also allege that Michell Deville's refusal to sign a ticket at the scene justified custodial arrest. However, Michell Deville testified that she was never shown the ticket and never asked to sign the ticket before her arrest.

Instead of being given a ticket, the welfare of her grandchild was threatened by an unreasonably aggressive officer. Without any provocation whatsoever, Petitioners Dewayne Tarver and Louis Dale Marcantel worked in concert to shatter Mrs. Deville's driver-side window on her (causing cuts and scarring to her face), forcibly remove her from her vehicle, twist her arms behind her back (causing long-lasting elbow injury), throw her against her vehicle, and put handcuffs on her so tightly that she had permanent nerve damage in both wrists that required four surgeries and extensive medical treatment. All of this harm was inflicted by two Turkey Creek law enforcement

officers in a traffic stop of a woman with no criminal history.

Additionally, Michell Deville was jailed twice stemming out of this one incident on charges that were immediately dropped by the district attorney. The Devilles have already suffered through injustice and injury in Turkey Creek, Louisiana. They brought this matter to court seeking redress for this injustice, and have provided ample evidence to allow this matter to proceed to trial.

Genuine issues of material fact exist concerning the unlawful arrest, excessive force and battery committed against Michell Deville on August 5, 2005.

Plaintiff specifically objects to all issues of error submitted by Petitioners Marcantel and Tarver cited in both writs, as genuine issues of fact permeate the questions of whether Petitioners' actions were objectively reasonable in this matter. Accordingly, the Fifth Circuit was correct in ruling that these contested facts must go to the trier of fact. This Court should deny Petitioner's Writ of Certiorari in this matter.

Plaintiffs-Respondents file this single brief in opposition to the two writs filed by petitioners (one by Marcantel and one by Tarver). Each issue presented by petitioners is opposed below in order of filing.

FACTS OF THIS CASE

On August 3, 2006, Michell and Ricky Deville filed suit in state court. Specifically, Michell Deville alleged that Petitioners, Louis Dale Marcantel and Dewayne Tarver, falsely arrested her, battered her, used excessive force against her and that she was maliciously prosecuted by defendants in violation of her rights under 42 U.S.C. Sections 1983. The Devilles claimed violations of state law by both of these defendants for assault, battery, excessive force, false arrest, false imprisonment and malicious prosecution. Finally, plaintiffs claimed that the Village of Turkey Creek is liable under respondeat superior.

On August 5, 2005, after 6:00 p.m. on a Friday evening, Michell Deville was operating her motor vehicle in a safe and prudent fashion driving her minor grandchild (who was riding in a restrained child car-seat in the backseat) in the Village of Turkey Creek in the Parish of Evangeline, State of Louisiana.

Michell Deville was pulled over without cause by Officer Dewayne Tarver of the Turkey Creek Police Department. Officer Tarver alleged that Mrs. Deville was going fifty (50) miles per hour in a forty (40) mile per hour zone. Mrs. Deville replied that she had her cruise on forty (40) miles per hour. (R. 221, Ex "C" p. 38-43, Court Doc. 42). Officer Tarver could not produce any radar confirmation of speeding.

While complying with officer in handing over her license, Michell Deville noted that the speeding

allegation was "bull····". (R. 221, Ex "C" p. 43, Court Doc. 42). Immediately thereafter and within two minutes of being pulled over, Officer Dewayne Tarver advised that he was arresting Michell Deville and that Mrs. Deville's two-year-old granddaughter would be placed in the custody of "Child Services". (R. 221, Ex "C" p. 49-50, Court Doc. 42).

Bewildered by Dewayne Tarver's aggressive reaction, Mrs. Deville rolled up her window and informed Officer Tarver that she was calling her husband, Ricky Deville, to pick up their granddaughter and assure her granddaughter's well being. (R. 221, Ex "C" p. 50, Court Doc. 42).

According to the Evangeline Parish Sheriff's Office incident report/log, Officer Tarver notified the dispatcher that he was arresting Michell Deville and inquiries were made concerning Child Protection Agency for Mrs. Deville's granddaughter. The mere fact that Child Protection was called so quickly evidences the malicious intention to scare and/or terrorize Mrs. Deville for the well being of her granddaughter.

Turkey Creek Police Chief Louis Dale Marcantel, who was called by Officer Tarver via cell phone, arrived on the scene soon thereafter (not in uniform, but in a sleeveless t-shirt and jeans and reeking of alcohol), and without provocation, shattered the driver's window of Michell Deville's car with his baton, spraying glass upon Michell Deville and the entire car, causing injury to her person, her grandchild and her property. (R. 221,

Ex "C" p. 55-62, Court Doc. 42). Mrs. Deville had cuts about her face and body. Neither Officer Tarver nor Chief Marcantel showed Mrs. Deville a ticket at the scene, and she was never asked to sign a ticket at the scene. (R. 221, Ex "C" p. 106, Court Doc. 42). Michell Deville never attempted to put her car in gear before Chief Marcantel began striking her window. (R. 221, Ex "B" p.51-52, Court Doc. 42).

After shattering the window in her face, Office Tarver and Chief Marcantel forcibly yanked on Mrs. Deville's left arm in an attempt to pull Mrs. Deville out of her vehicle through her broken, driver-side window. After this painful attempt failed, Officer Tarver reached through the broken vehicle and unlocked the door, at which time Officer Tarver and Chief Marcantel forcibly dragged Mrs. Deville out of her car, grabbed and twisted her right arm behind her back, and slammed her into her own vehicle forcing her to fall to the ground. (R. 221, Ex "C" p. 43, Court Doc. 42). Officer Tarver and Chief Marcantel then forcibly handcuffed Mrs. Deville in an excessively tight manner, and put Mrs. Deville into the police vehicle. Throughout this entire extraction sequence, Mrs. Deville's granddaughter was screaming (and Mrs. Deville did not know if her cries were the result of injury from flying glass or the traumatic nature of these events). (R. 221, Ex "C" p. 55-62, Court Doc. 42).

After the incident, Michell Deville was brought to the Evangeline Parish Sheriff's office and then to the hospital. Additionally, Ricky

Deville and the nurses at the hospital will testify that they smelled alcohol on Chief Marcantel's breath. Chief Marcantel has countered these accusations by saying that the reason for this smell is merely his liberal use of "Germ-X" soap on his arms. (R. 221, Ex "C" p. 105, Ex. "A" p. 59, Court Doc. 42). All charges against Mrs. Deville were dropped by the Evangeline Parish District Attorney's Office. (R. 221, Ex "C" p. 77-80, 124, 138, Court Doc. 42).

Michell Deville sustained severe injury to her person as a result of this excessive force as follows:

1. Right upper extremity crush injury - right wrist and fingers required four (4) surgeries due to neuropathy, and multiple injections, braces and therapy for elbow, wrist and fingers;

2. Left upper extremity injury - neuropathy to left wrist; crush injury (like right wrist) from excessive force;

3. Cuts to the bridge of her nose, top/scalp of her head, left nostril, left side of her nose near her eye, above her lip, right ankle, right thigh, left big toe, and the back of her left leg;

3. Injury to her jaw, from being thrust into the vehicle;

4. Bruising and soft tissue injury all over her body, including low back and pelvis;

5. Permanent scarring on her right wrist and face;

6. Mental anguish for having to experience this trauma; and

7. Mental anguish including depression, humiliation and anxiety for her job being placed in jeopardy and having her name listed in the paper as a criminal. (R. 221, Ex "C", Court Doc. 42; Deposition of Dr. Thomas Fontenot (Listed in Appendix as Manual Attachment to Michell Deville's Opposition to Motions for Summary Judgment, Ex. A).

Before this incident, Michell Deville had no history of injuries or claims, and specifically no history of right or left arm pain. She had never been arrested in her life. (R. 221, Ex "C" p. 74, Court Doc. 42).

On the evening of this incident, Michell Deville was taken by Acadian Ambulance to Ville Platte Medical Center and treated for low back pain, right and left wrist pain (swelling and redness noted), headache, right and left shoulder pain, multiple puncture wounds in her scalp with active bleeding and glass, and other lacerations. Michelle Deville followed up with Dr. Thomas Fontenot (general practitioner) the day after the

incident and was diagnosed with the same complaints and with bilateral neuropathy, contusions on her wrists, right shoulder strain, and anxiety. (Deposition of Dr. Thomas Fontenot).

Dr. Fontenot referred Michell Deville to Dr. Barry Henry (orthopedic surgeon), who performed *right carpel tunnel release* and *injections in her right elbow*. Continued problems post-surgery in her right hand, wrist and fingers necessitated a Medrol Dosepak and hand physical therapy. Mrs. Deville's work as a nurse required writing, and this was aggravating her condition. Additionally, she was prescribed a wrist brace and finger splints. Her pain and weakness in her right arm, wrist, hand and fingers progressed until a second round of surgeries was necessary. *Id.*

In December of 2006, Dr. Henry performed the following invasive procedures:

1. Right wrist de Quervain's tenosynovitis release (first extensor compartment),

2. Right trigger thumb release with ganglion excision over the tendon sheath of the thumb,

3. Right middle finger trigger release, and

4. Repeat right elbow injection. *Id.*

Mrs. Deville continues to have problems in her right elbow, wrist and fingers, and this pain

and weakness is now chronic. *Id;* Deposition of Dr. Barry Henry, P. 34. She also has permanent scarring on her hand and wrist. (R. 221, Ex "C" p. 154-155, Court Doc. 42).

These acts have terrorized Mrs. Deville, causing her to lock her doors and fear law enforcement and driving on country roads. Depositions of Ricky Deville, P. 47-51, Ex. C. to 5th Circuit Appellant Brief.

At the time of this accident, Michell Deville was employed by Savoy Home Health as a registered nurse, and as a direct result of her injuries from the excessive force in this case and the two subsequent surgeries, she has incurred past lost wages (totaling $11,095.04).

ARGUMENT IN OPPOSITION TO MARCANTEL WRIT

I. GENUINE ISSUES OF MATERIAL FACTS EXIST CONCERNING WHETHER THE FORCE USED BY MARCANTEL WAS EXCESSIVE; THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *MIMMS*.

In his brief in support of writ application, Petitioner Louis Dale Marcantel frames the Section "I" issue by alleging a direct conflict between the Fifth Circuit's decision in this case and this Court's prior ruling in *Pennsylvania v. Mimms*, 343 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) and Louisiana state law.

This argument is a red herring, as is evidenced by the *presupposed contradicted facts* used to support Petitioner's contentions. Petitioner Marcantel uses broad strokes to paint the Fifth Circuit opinion as an unequivocal rejection of qualified immunity in all car extraction cases. Marcantel claims the Fifth Circuit has ruled that all persons have a "clearly established" right from forceful extraction from a vehicle. That is not what the Fifth Circuit held. In fact, the Fifth Circuit carefully dissected the contested facts in this particular case to find that, when viewing the evidence in a light most favorable to the plaintiffs, genuine issues of material fact do exist as to whether Marcantel's actions of smashing the window and forcibly grabbing Michell Deville and dragging her out of her vehicle were objectively unreasonable (excessive force).

In this matter, that reasonableness query is the crux of the case for all issues presented by Petitioners. "The touchstone of the analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Mimms* at 109. As stated above, the ultimate determination on whether the force used is excessive is a "reasonableness standard" that should be decided by the jury. Are there genuine issues of fact as to whether the actions of Marcantel were unreasonable? Was it unreasonable or excessive force for Louis Dale Marcantel to show up at the scene, out of uniform, reeking of alcohol, immediately smash the driver's side window on Michell Deville, rip her out of her

car, and forcibly bend her arms behind her back? If so, than summary judgment is improper and this writ should be denied.

The arguments brought by Petitioner Marcantel as the basis for his writ application discuss only Marcantel's side of the story. Specifically, Petitioner continually describes the "exigency of the situation". The problem with that rationale is that the Petitioner uses contradicted facts to support this "exigent" situation and justification for the force used by Marcantel.

Petitioner alleges the following facts in support of its contention that exigent circumstances were present at this August 5, 2005 arrest (all of which are contested and have been contradicted by testimony and cited above) -- Michell Deville behaved irrationally, Mrs. Deville flew into a rage shouting obscenities, Mrs. Deville decided to try the merits of her traffic violation on the road, Mrs. Deville refused to cooperate, twenty-one (21) minutes elapsed while Mrs. Deville was on the side of the road, Mrs. Deville's grandchild was in distress before Marcantel attempted to break the window, Mrs. Deville assaulted Marcantel, Mrs. Deville refused to sign the citation, Marcantel was trying to save the child, and that Mrs. Deville attempted to put her car in gear.

The factual evidence in the record contradicts all of these allegations. As the Fifth Circuit recognized, testimony in evidence from Michell Deville relayed that she was calm, not irrational, was never shown a ticket (and in fact

that the ticket was not even written until she was at the jail), never threatened anyone, and never attempted to flee the scene. (R. 221, Ex "C" p. 139-140, Court Doc. 42). Even Dewayne Tarver agrees that Mrs. Deville never attempted to put the car in gear until after Marcantel began beating on her window in an effort to break it. (R. 221, Ex "B" p. 51-52, Court Doc. 42). These are all issues of fact for the jury.

The reason Petitioner asserts these "exigency" facts is because it cannot justify the force used by Petitioner Marcantel without exigency allegations. These contested issues of fact preclude summary judgment in this matter.

Even Petitioner's own law enforcement expert, Larry Gould, agrees that based on the facts as described by Michell Deville and Officer Tarver (concerning Mrs. Deville never attempting to put her car in gear before Chief Marcantel broke her window), continued negotiations would have been "more appropriate than breaking the glass at that point".[1] Plaintiffs' expert, Lloyd Grafton, testified that breaking the window in a woman's face with a child in the car under these circumstances was excessive force.[2]

Petitioner cites three reasons in support of why it believes Marcantel is entitled to qualified immunity in Section I of its argument:

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[1] Deposition of Larry Gould, P. 39, Attached as Ex. D.

[2] Deposition of W. Lloyd Grafton, Attached Report, P. 4-5.

> 1) In light of *Mimms* and La. C.Cr.P. art. 224, it cannot be said that it is 'clearly established' that an officer uses constitutionally excessive force by breaking a suspect's window to compel her from the vehicle;
>
> 2) Even if plaintiff proves a 'clearly established' right, Chief Marcantel's actions were not objectively unreasonable in light of plaintiff's actions, disobedience of lawful orders and ultimate battery upon Chief Marcantel; and
>
> 3) Chief Marcantel's use of force was sanctioned under Louisiana law generally and specifically pursuant to La. C.Cr.P. Art. 224 and cannot, under these facts, be excessive as a matter of law. Marcantel Writ Application, Pgs. 14 and 15.

In Petitioner's first "reason", Petitioner uses the *Mimms* decision, in support of its contention that Marcantel's actions were reasonable as a matter of law. *Mimms* dealt with a criminal defendant seeking to suppress evidence (an illegally concealed weapon). *None of the facts in Mimms were in dispute.* Two Philadelphia police officers *lawfully detained* Harry Mimms, who was driving an automobile with an expired license plate (uncontested). One of the officers approached and asked respondent to step out of the car, and Mimms alighted. The officer's then noticed a bulge in

defendant's clothing and upon frisking discovered an illegally concealed loaded revolver in his waistband. *Pennsylvania v. Mimms*, 343 U.S. 106, 107, 98 S.Ct. 330, 331, 54 L.Ed.2d 331 (1977). This Court held that it was not unreasonable for an officer under the *Mimms* facts to ask a *lawfully detained defendant* to exit a vehicle (not unreasonable search or seizure).

In this case, issues of fact exist as to whether there was a lawful stop and as to the excessive force used against a grandmother unlawfully stopped, threatened, and the victim of battery and excessive force. This case in no way reverses or ignores *Mimms*.

Additionally, Petitioner cites La. C.Cr.P. Art. 220 and 224, two articles that codify the law that exists everywhere in this country, that an officer *may* use force and *may* even break a window when reasonable. Nothing in these code articles authorize what happened in this case, when the facts are viewed in a light most favorable to the plaintiff.

Neither of these authorities purports to diminish a persons' "clearly established" right to be free from excessive force, as described by the Fifth Circuit in this case:

> When the arrest occurred, Deville had a clearly established right to be free from excessive force, *Tarver v. City of Edna*, 410 F.3d at 753-54, and it was clearly established that the amount of force that the officers could use "depend[ed] on the severity of the

crime at issue, whether the suspect posed a threat to the officer's safety, and whether the suspect was resisting arrest or attempting to flee," *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008). Accepting Deville's version of events for summary judgment purposes, this case involved: a traffic stop for a minor traffic offense unsupported by probable cause; Deville's passive resistance to being removed from her car and separated from her grandchild, in compliance with her well-established rights under state law to resist an unlawful arrest (*i.e.*, an arrest unsupported by probable cause); the officer's threat of calling child protective services despite no indication that the child was in distress or that Deville intended to flee; an officer who others said smelled of alcohol beating on Deville's driver's window with a heavy flashlight and breaking the window; a rough extraction of Deville from the vehicle by both officers, causing a forceful blow to Deville's abdomen; and handcuffs applied so tightly that they caused severe nerve damage. These alleged facts are sufficiently egregious to warrant a denial of qualified immunity because a reasonable officer would have known that the degree of force was unconstitutionally excessive under the

> circumstances. *See Bush*, 513 F.3d at 501. Accordingly, defendants are not entitled to qualified immunity on the §1983 excessive force claims. (See Appx to Marcantel Writ Application, 20a-21a).

The Petitioner's second "reason" again presupposes Marcantel's actions were not "objectively unreasonable in light of plaintiff's actions, disobedience of lawful orders and ultimate battery upon Chief Marcantel" – all of which are contested issues of fact noted above.

Petitioner's third "reason" in support of Section I reads that because use of force is permitted under Louisiana law, "under these facts", the force as a matter of law cannot be excessive. Again, the basis for this argument is that this force is permissible "under these facts" – *these* facts being the same contested exigency facts mentioned above.

Accordingly, this writ should be denied and the ruling of the Fifth Circuit should be upheld.

II. GENUINE ISSUES OF MATERIAL FACTS EXIST CONCERNING WHETHER MARCANTEL WAS "OBJECTIVELY REASONABLE" IN SMASHING THE WINDOW ON MICHELL DEVILLE TO EXTRACT HER FROM THE VEHICLE.

In this case, the Fifth Circuit laid out the factors to be considered in an excessive force claim concerning the reasonableness of the force used:

> To establish a claim of excessive force under the Fourth Amendment, plaintiffs must demonstrate: "(1) injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Tarver v. City of Edna*, 410 F.3d 745, 751 (5th Cir. 2005). Excessive force claims are necessarily fact-intensive; whether the force used is "excessive" or "unreasonable" depends on "the facts and circumstances of each particular case." *Graham v. Connor*, 490 U.S. 386, 396 (1989); *see also Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (observing that this "area is one in which the result depends very much on the facts of each case"). Factors to consider include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is

> actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. (See Appx to Marcantel Writ Application, 15a-16a).

The Fifth Circuit found that under the *Graham* factors, summary judgment could not be granted in this matter, because of the following evidence presented by Respondent created issues of fact as to the objective reasonableness of the force used:

- Mrs. Deville was stopped for a minor traffic violation -- exceeding the 40 mph speed limit by 10mph -- making the need for force substantially lower than if she had been suspected of a serious crime.

- Mrs. Deville testified that she was never asked to sign a traffic ticket, and therefore never refused to sign one.

- There was no reason to believe that Mrs. Deville's actions posed a threat to the officers, herself, or to her grandchild -- whom Mrs. Deville testified was perfectly calm until Marcantel began beating and breaking the car window.

- Mrs. Deville was in control of the vehicle and its motor was running (to keep the car cool on a hot August day)

and its gear in park, there was no evidence or other indication that she would flee or use the vehicle as a weapon, and she told the officers that she was waiting for her husband to arrive.

- Mrs. Deville's resistance was, at most, passive in that she merely refused to leave her grandchild and exit the vehicle until Mr. Deville came to get the child -- not that she affirmatively, physically resisted as the officers contend.

- Marcantel engaged in very little, if any, negotiation with her and instead quickly resorted to breaking her driver's side window and dragging her out of the vehicle.

- Mrs. Deville's grandchild was quiet during the stop, was not in danger, and only became distressed when the officers began using force.

- Both parties' experts agree that continued negotiations are more appropriate than actual force where the suspect is only stopped for a minor traffic offense and is making no attempt to flee.

As stated above, Michell Deville testified that Petitioner Marcantel smashed her window,

forcibly dragged Mrs. Deville out of her car, grabbed and twisted her right arm behind her back, and slammed her into her own vehicle forcing her to fall to the ground. (R. 221, Ex "C" p. 43, Court Doc. 42). Petitioner Marcantel justifies this force by alleging that Michell Deville was acting wildly and that this was an explosive situation. Michell Deville has testified that she was not acting wildly, but rather that Dewayne Tarver and Louis Dale Marcantel were aggressive and unreasonable in their handling of her. These are issues of fact and make this case one of credibility.

Law Enforcement expert W. Lloyd Grafton testified that a routine traffic stop with an alleged speeding violation of 10 miles per hour over the speed limit should not result in busting out windows, forcibly removing Michell Deville from her vehicle and causing permanent injury. Grafton also testified that the arrest of Michell Deville was not necessary nor was the force used by the officers necessary or reasonable under the conditions.[3]

Officers must assess not only the need for force, but also "the relationship between the need and the amount of force used." *Gomez v. Chandler*, 163 F.3d 921, 923 (5th Cir. 1999). Again, this reasonableness inquiry is fact intensive and the Fifth Circuit has held that plaintiffs have met their burden of providing genuine issues of material fact as to whether Petitioner Marcantel's degree of force was objectively reasonable.

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[3] *Id.*

Petitioner cites three cases in support of its contention that, as a matter of law, Marcantel actions in this case were reasonable. All three cases involve *exigency* not present in this matter. None of these cases involve facts similar to this case, nor do they even generally involve breaking glass to drag someone out of a vehicle in a traffic stop.

1. *Tellez* is case concerning the suppression of firearms evidence in a criminal matter on appeal after conviction. The officers had been advised to look for and eventually pulled over a suspected parole violator's truck with three persons inside. *U.S. v. Tellez*, 11 F.3d 530, 531 (5th Cir. 1993). The driver of the truck, later recognized as a convicted felon by one of the officers, refused to exit and was yanked out of the truck and eventually arrested for possession of illegal firearms. *Id.* The court held that the evidence of firearms was permissible because the "yanking" was due to the exigency surrounding the dangerous situation and risk involved in pulling over a suspected parole violator with two other persons in the vehicle. *U.S. v. Tellez* at 533.

2. The second case cited by defendants actually favors plaintiffs. In *Mecham*, *the facts were not in dispute* and there was a dashboard camera capturing the 50 minute sequence of events after a

person was lawfully pulled over for speeding and driving with a suspended license. *Mecham v. Frazier*, 500 F.3d 1200 (10th Cir. 2007). The court noted that where there are disputed issues of fact the jury is the appropriate fact finder, but "the question of objective reasonableness is *not* for the jury to decide *where the facts are uncontroverted*". *Mecham* at 1203. Emphasis added.

3. Lastly, Petitioner cites the case *Smith v. Ball State Univ.*, 295 F.3d 763 (7th Cir. 2002). In that case, campus police opened a car door and extracted a completely nonresponsive and suspected intoxicated student who had come to rest with his vehicle running on a campus sidewalk after nearly hitting several pedestrians. *Smith* at 766. The court found that the force used was minimal to extract the nonresponsive student and there is no mention of any contradicting facts. *Smith* at 771.

Accordingly, this writ should be denied and the ruling of the Fifth Circuit should be upheld.

III. FIFTH CIRCUIT WAS CORRECT ON THE STATE LAW EXCESSIVE FORCE CLAIMS BECAUSE GENUINE ISSUES OF MATERIAL FACTS EXIST CONCERNING WHETHER *REASONABLE FORCE* WAS USED.

Petitioner Marcantel alleges that "probable cause" for the arrest existed as to Marcantel because of his reliance on Officer Tarver's instruction that Michell Deville refused to sign the ticket. However, Petitioner admits in his own writ application that "Marcantel tried to explain to Deville if she just signed the ticket, she could be on her way." (R. 221, Ex "A", p. 49, ln. 9-14, Court Doc. 42; Writ Application p. 5). Michell Deville testified that she was never shown the ticket and *never asked to sign a ticket by anyone* before her arrest. These are issues of credibility and fact as to both Petitioners. If no ticket was ever produced to Mrs. Deville and Mrs. Deville was never asked to sign a ticket by any officer, then Marcantel's own alleged statement is untrue, thus vitiating whatever reasonable and/or probable "cause" he could have had. Again, issues of fact permeate whether Marcantel even had probable cause.

Petitioner also alleges that "probable cause" for the arrest existed as to Marcantel because of seven (7) disputed facts already discussed above. (Writ Application p. 19).

That "probable cause" prong is only the first step in the reasonable force inquiry. As discussed in detail above, genuine issues of material fact exist

as to the "reasonableness" of the forced used by Marcantel. Accordingly, this writ should be denied and the ruling of the Fifth Circuit should be upheld.

IV. THIS CASE DOES NOT HAVE SIGNIFICANT PUBLIC POLICY IMPLICATIONS.

Petitioner Marcantel wants this Court to grant Writ of Certiorari under the mistaken premise that the Fifth Circuit, in its detailed factual review of this matter (a fact scenario far different from that of *Mimms*), has somehow erased a law enforcement officer's right to compel a driver out of a vehicle.

No one is questioning an officer's right to break a window or compel a person out of a vehicle when the situation warrants it. The reasonableness of the force still has to be considered. This Court's jurisprudence and Louisiana law do not give license to law enforcement officers to go around breaking windows and yanking people out of cars in all situations. The factors for use of force still apply and there must be an inquiry as to whether the force is reasonable.

This case does not involve a simple request to exit a vehicle. It involves an officer threatening a child and disputed facts as to whether the initial stop and eventual arrest were lawful and in good faith.

In support of its public policy argument, Petitioner Marcantel again argues that:

> Chief Marcantel was forced to make a split-second decision on the side of the road in an increasingly volatile situation as to whether to use force to compel this recalcitrant driver out of the vehicle, or do nothing and run the risk that Deville's continued irrational behavior would threaten the life of the suspect, the officer, or an innocent bystander (such as the crying minor child in the back seat of plaintiff's car). (Marcantel Writ Application p. 23).

Petitioner cannot ignore the contested facts that this was not an exigent situation, that Mrs. Deville was not irrational, and that the child was not crying until after he began breaking the window. These are issues of fact.

The Fifth Circuit decision is in compliance with state and federal law and jurisprudence, and as such should be upheld.

ARGUMENT IN OPPOSITION TO TARVER WRIT

A. GENUINE ISSUES OF FACT EXIST AS TO WHETHER TARVER'S ARREST OF DEVILLE WAS LAWFUL.

1. GENUINE ISSUES OF FACT EXIST AS TO WHETHER TARVER HAD REASONABLE SUSPICION TO DETAIN MICHELL DEVILLE.

Petitioner Tarver alleges that, because Tarver had "reasonable suspicion" to stop Michell Deville for speeding, he lawfully detained Mrs. Deville. Again, Tarver's allegations that she was lawfully stopped are premised on the fact that Mrs. Deville was in fact speeding. That is an issue of fact for the jury in this case. The entire remainder of the Tarver writ is premised on this stop of Mrs. Deville being an "lawful stop". As such, Tarver's entire writ fails for the same reasons assigned by the Fifth Circuit: Issues of fact exist as to whether the initial stop and the arrest of Michele Deville were lawful.

Petitioner Tarver's own testimony provides the only allegation of speeding. Mrs. Deville has provided evidence that specifically refutes the speeding allegation and calls into question Tarver's credibility. Thus, issues of fact exist as to whether there was reasonable cause for a lawful stop and probable cause for a lawful arrest.

Petitioner Dewayne Tarver was the first officer to pull Michell Deville over. Defendants' own law enforcement expert, Larry Gould, testified that it is "interesting" to look into a law enforcement officer's history to see if there is a "trend" of the officer acting outside the scope of his authority.[4] When considering Dewayne Tarver's testimony, it is "interesting" to note that Tarver had a history of *threatening to call child protection prematurely, dereliction of duty, quick temperedness*, and a fellow officer testified that he had been involved in numerous instances where he used *excessive force* and made *unlawful arrests*.[5] On one occasion, *Dewayne Tarver was untruthful on the stand at trial*.[6]

Petitioner Tarver admitted that, since this accident, he was *asked by the Sheriff of Evangeline Parish to resign his position with the Evangeline Parish Sheriff's Department and then later asked by the Evangeline Parish District Attorney to resign his position with Turkey Creek and* ***leave Evangeline Parish altogether****, due to on the job complaints against him.* (R. 221, Ex "B" p. 87-88, Court Doc. 42).

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[4] Deposition of Larry Gould, P. 40-42, (Listed in Appendix as Manual Attachment to Michell Deville's Opposition to Motions for Summary Judgment, Ex. D).

[5] Deposition of Sergeant Adam Fruge, P. 5, 35-45, (Listed in Appendix as Manual Attachment to Michell Deville's Opposition to Motions for Summary Judgment, Ex. E).

[6] Id. at P. 44.

In his writ application, Tarver is quick to point out the Fifth Circuit quote that Tarver gave "uncontradicted" testimony that his radar indicated that Mrs. Deville was speeding. First, Mrs. Deville's own testimony that she was not speeding contradicts Tarver's allegation. Second, immediately after that Fifth Circuit quote citied by Tarver, the court clearly points out the genuine issues of material fact concerning Tarver's credibility and whether any cause was present for the stop or arrest:

> Plaintiffs, however, have provided evidence that would allow the jury to disbelieve Tarver's testimony. "[A] motion for summary judgment cannot be defeated solely by conclusional allegations that a witness lacks credibility. Nevertheless, when the circumstances are conducive to lying, well-supported suspicion of mendacity may serve as a legitimate basis for the factfinder's reasonable inferences concerning the ultimate facts at issue." *Thomas v. Great Atl. & Pac. Tea Co.*, 233 F.3d 326, 331 (5th Cir. 2000) (footnote omitted). Summary judgment is not appropriate when "questions about the credibility of key witnesses loom . . . large" and the evidence could permit the trier-of-fact to treat their testimony with "skeptical scrutiny." *Id.* at 331.

Tarver admitted that he has a history of problematic arrests and that citizens have made complaints against him. The Evangeline Parish Sheriff asked him to resign his position as a sheriff's deputy (which he held simultaneously with his position with the Village of Turkey Creek) because of a complaint of excessive force in an unrelated case. More directly implicating his credibility, Tarver admits the parish district attorney asked him to resign from the Turkey Creek police department because he filed a false charge of possession of marijuana against an individual who in fact did not have marijuana (that incident is also otherwise unrelated to the instant case). And although Tarver testified that the radar gun had the ability to "lock-in" a detected speed, he did not "lock-in" the speed in the Deville case -- and, as a result, he was unable to verify the speed when asked by Deville's husband to do so. In light of this discrediting evidence -- especially evidence that Tarver has falsified other charges -- and Deville's sworn testimony that she was not speeding because her cruise control was set on 40mph, a reasonable jury could disbelieve Tarver's testimony and find that he lacked probable cause for the first arrest. (See Appx to Marcantel Writ Application, 9a-10a).

2. GENUINE ISSUES OF FACT EXIST AS TO WHETHER TARVER'S ORDER FOR DEVILLE TO EXIT HER VEHICLE WAS LAWFUL.

The same rationale cited above holds true for Petitioner Tarver's order to Michele Deville to exit the vehicle after the arguably unlawful stop. If Tarver had no reasonable or probable cause to stop Mrs. Deville in the first place, the entire stop was unlawful. Even Tarver concedes this notion in his brief, as he indicates as a premise for his argument that, "It has already been established that Officer Tarver lawfully detained Deville upon a reasonable suspicion that she was speeding". Tarver Writ Application, Page 11. That has not been established. There are issues of fact as to whether the stop was lawful.

As noted by the Fifth Circuit, genuine issues of material fact exist as to whether any reasonable suspicion existed for Tarver to stop Mrs. Deville and as to the veracity of Tarver's speeding allegation.

Tarver's argument to this Court *does* demonstrate a shift in Tarver's legal strategy. Tarver is now claiming that the probable cause for the arrest was not Mrs. Deville's failure to sign the alleged ticket (as argued by Marcantel and previously by Tarver), but that it was her failure to exit the vehicle that led to the probable cause for her arrest. Tarver alleges that Michelle Deville's failure to exit her vehicle when ordered to do so

was "resisting an officer" under Louisiana law. Again, if the stop was unlawful, then the order to exit the vehicle after the stop was unlawful as well. Mrs. Deville has the right to resist unlawful arrest. *State v. Lindsay*, 388 So.2d 781, 782 (La. 1980).

Further, issues of fact exist as to whether Tarver told Mrs. Deville she was under arrest before he ever ordered her out of the vehicle. Evidence has revealed that after being pulled over, Michell Deville was compliant with Officer Tarver at the scene, gave him her license and was reaching for her registration. (R. 221, Ex "C" p. 43, Court Doc. 42). While reaching for her registration and before ever seeing a ticket or being asked to sign a ticket, Officer Tarver advised that he was arresting Michell Deville and that Mrs. Deville's granddaughter would be placed in the custody of "Child Services" (a horrifying notion for a grandmother with no criminal record isolated on a country road). (R. 221, Ex "C" p. 49-50, Court Doc. 42). Only then did Mrs. Deville roll up her window to ensure the safety and wellbeing of her granddaughter. Only two people have given testimony concerning the sequence of events just before the initial stop up to the arrival of Marcantel. Those two people are Michell Deville and Dewayne Tarver.

If Michell Deville's testimony is to be accepted as true, she has a valid claim under the law for false arrest against Officer Tarver. Additionally, Mrs. Deville testified that Tarver announced he was arresting her and calling child services BEFORE asking her to exit the vehicle.

Accordingly, genuine issues of material fact also contradict whether Tarver announced his arrest of Mrs. Deville before or after he ordered her out of the vehicle.

B. GENUINE ISSUES OF FACT EXIST AS TO WHETHER TARVER USED OBJECTIVELY UNREASONABLE FORCE.

In support of Tarver's contention that he was authorized to use "reasonable force", Tarver cites La. C.Cr.P. Art. 220, which requires persons to "submit peaceably to a lawful arrest". A prerequisite to La. C.Cr.P. Art. 220 is that the arrest be *lawful*. Under Louisiana law, a person commits the offense of resisting arrest only if she resists a "lawful arrest" supported by probable cause. La. Rev. Stat. § 14.108(A); *State v. Lindsay*, 388 So.2d 781, 782 (La. 1980). "It is a long-established principle in Louisiana law that a citizen has the right to resist an unlawful arrest." *Lindsay*, 388 So.2d at 782. Thus, whether Mrs. Deville was lawfully arrested depends on whether Tarver ever had probable cause to conduct the arrest in the first place. If Tarver did not, then Mrs. Deville's resistance was lawful. These are issues of fact.

Further, issues of fact also exist concerning whether the amount of force used by Tarver was reasonable. The ultimate determination on whether the force used is excessive is a "reasonableness standard" decided by the jury. In gauging the objective reasonableness of the force used by a law

enforcement officer, the court must balance the amount of force used against the need for that force. *Ikerd v. Blair,* 101 F.3d 430 (5th Cir.1996). A plaintiff asserting an excessive force claim is also required to show that she suffered injury. The injury must be more than a *de minimis* injury and must be evaluated in the context in which the force was deployed. *Knight v. Caldwell,* 970 F.2d 1430 (5th Cir.1992), *cert. denied* 507 U.S. 926, 113 S.Ct. 1298, 122 L.Ed.2d 688 (1993).

Under Louisiana state law, law enforcement officers have no choice in properly applying the handcuffs to arrestees. That is, officers have a duty to apply them in a non-negligent manner. *Saine v. City of Scott,* 819 So.2d 496, 2002-265 (La.App. 3 Cir. 6/12/02).

> An arresting officer owes a duty to the person in the Officer's custody *to protect him or her from injury and to care for his or her safety. See Evans v. Hawley,* 559 So.2d 500 (La.App. 2 Cir.1990). 'The Officer must do what is reasonable under the circumstances and is liable only for a certain category of risks to which his prisoner is subjected.' *Id.* at 504. Defendants' own testimony establishes that officers are required to double lock an arrestee's handcuffs and then insert two fingers between them to assure the cuffs are not too tight. Apparently this procedure is required to prevent an arrestee from suffering injuries that

> could result from excessively tight handcuffs. As noted, the trial court found Officer Romero applied the cuffs too tight and failed to loosen them after being informed by Mr. Saine they were too tight. We find sufficient evidence in the record to support this finding. Officer Romero's action, i.e., his failure to loosen the cuffs after Mr. Saine informed him they were too tight, was an operational task that did not require him to make a policy decision. That is, the decision was not based on "social, economic, or political concerns." *Chaney,* 583 So.2d at 929. He was required to place the cuffs on him in a non-negligent manner. Once Mr. Saine was in his custody, Romero had a legal *duty to protect him from injury.* The trial court found as a matter of fact Officer Romero breached that duty, thereby causing Mr. Saine's injuries; and neither he nor the City of Scott have immunity from liability under La.R.S 9:2798.1. *Saine v. City of Scott,* 819 So.2d 496, 2002-265 (La.App. 3 Cir. 6/12/02).

There are separate instances of Dewayne Tarver using excessive force against Michell Deville on August 5, 2005:

1. His (joined with Louis Dale Marcantel's) forcible removal of Michell Deville from her vehicle,

contorting her arm, and throwing Mrs. Deville against her vehicle; and

2. His handcuffing Mrs. Deville's wrists too tightly causing permanent neurological injury.

The forcible removal issues are briefed above and adopted herein. As for the handcuffing, the handcuffs were extremely tight and caused extensive and permanent wrist injuries to Mrs. Deville. She also testified that she did not feel either officer double lock the handcuffs by placing their fingers between the cuffs and her wrists. (R. 221, Ex "C" p. 147-148, Court Doc. 42). Dewayne Tarver testified in his deposition on July 10, 2007, that the handcuffs were double locked at the time of her arrest but not double locked while she was traveling in the police unit. (R. 221, Ex "B" p. 103-106, Court Doc. 42).

Medical testimony confirms serious, objective injury caused by the handcuffs and substantiating the claim that the handcuffs were unreasonably tight on Michell Deville. Mrs. Deville had swelling in her wrist at the ER the night of the arrest, symptomology in both wrists the next day at the doctor, and testing eventually revealed right wrist crush injury (neuropathy that required multiple surgeries) and left wrist crush injury (neuropathy).[7] Certainly, these injuries far surpass this Court's *de*

[7] Deposition of Dr. Thomas Frederick; Deposition of Dr. Barry Henry.

minimus standard. In fact, her surgeon, Dr. Barry Henry, testified that:

> "This lady had apparently, I wasn't there, handcuffs pressed so hard on her wrists that it squeezed her dorsal sensory nerve of her radial nerve distribution, it squeezed her median nerve, and as you know all nerves are connected in the spinal cord, in the brain, and there's been some pathway set off that didn't completely heal as I would have hoped for Michelle..."[8]

Defendants' criminal justice expert, Larry Gould, agrees that both putting handcuffs on too tightly and failing to double lock handcuffs constitute violations of police policies and procedures.[9] As such, issues of fact again dictate that a jury must decide whether applying handcuffs this tight is unreasonable.

C. OFFICER TARVER IS NOT ENTITLED TO QUALIFIED IMMUNITY IF HE HAD NO CAUSE FOR THE STOP AND/OR IF HE USED UNREASONABLE FORCE.

The qualified immunity paragraph in Tarver's writ is incomplete and difficult to follow. It basically alleges that since Mrs. Deville cannot establish facts in support of a claim for unlawful

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[8] Deposition of Dr. Barry Henry, P. 34.

[9] Deposition of Larry Gould, P.58-59.

arrest or excessive force in violation of her constitutional rights, Tarver is entitled to qualified immunity. Genuine issues of fact exist to the lawfulness and/or reasonableness of the arrest and the force used. As such, Tarver fails to meet his burden for summary judgment. At one point, Tarver asks for *en banc* review and then cites an in depth case analysis to follow that does not materialize.

Respondent adopts all facts, law and analysis presented above in response to both writs filed in this matter. Particularly, Respondent adopts all briefing concerning qualified immunity, excessive force, unlawful arrest and reasserts that issues of fact exist as to whether both Marcantel's and Tarver's actions were objectively reasonable.

CONCLUSION

These Writs for Certiorari filed by Petitioners Marcantel and Tarver should be denied, as the Fifth Circuit committed no error of law and as genuine issues of material fact exist concerning whether Petitioners Marcantel and Tarver were reasonable in the force used in this matter and whether the arrest in this matter was lawful.

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No. 09-755

IN THE

Supreme Court of the United States

LOUIS DALE MARCANTEL, Individually and in his Official Capacity as Chief of Police of the Village of Turkey Creek,

Petitioner,

v.

MICHELL B. DEVILLE and RICKY DEVILLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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I. PRELIMINARY STATEMENT

Respondent focuses solely on alleged "disputed issues of fact" but fails to address the actual holdings of this Court as to qualified immunity (and in fact, the alleged disputed issues of fact are not "material" to a proper qualified immunity analysis). Respondent does not address the Court's qualified immunity jurisprudence or the basis of probable cause. Given the fact that this Court has recognized that "the risk of harm to both the police and the occupants [of a stopped vehicle] is minimized . . . if the officers routinely exercise *unquestioned command of the situation.*" *Arizona v. Johnson*, __ U.S. __, 129 S.Ct. 781, 786, 172 L.Ed.2d 694 (2009)[emphasis ours], the issue of whether the right allegedly violated was laid out with sufficient specificity by the Courts is of paramount importance. *Wilson v. Layne*, 526 U.S. 603, 615, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). Respondent did not have a "clearly established" right delineated with such specificity to deny Chief Marcantel qualified immunity in this case.

II. ARGUMENT AND AUTHORITIES

A. Respondent misapplies this Court's Qualified Immunity and Probable Cause Jurisprudence

1. Qualified Immunity

Respondent mistakenly asserts "that reasonableness query is the crux of the case for all issues presented by Petitioners." (*See* Brief in Opposition at pg. 10). This statement shows Respondent's fundamental misapplication of this Court's qualified immunity

jurisprudence. Even if Petitioner's actions on August 5, 2005 were "objectively unreasonable" (which is completely and utterly denied), in *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) this Court held the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is a distinct inquiry from the merits of the excessive force claim. Has a constitutional right been violated on the facts alleged is a starting point. However, even if a violation could be made out on a favorable view of the parties' submissions (i.e. on the facts as alleged by Respondents), the next step in the analysis for the Court to determine is whether the right was clearly established. There was no Constitutional violation by Chief Marcantel. However, even if there was, it cannot be said the alleged Constitutional violation was clearly established. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier*, 533 U.S. at 202. Given the jurisprudence and statutes in existence on August 5, 2005, Petitioner reasonably believed he had probable cause to arrest the Respondent and thus to utilize the force he used to effectuate that arrest. Respondent says because Respondent disputes the facts, any action by Petitioner was unreasonable and qualified immunity fails. This is incorrect and misapplies this Court's qualified immunity jurisprudence. This Court has never reached the issue of which type or the *degree* of force a police officer may use to compel a non-compliant suspect out of a vehicle while on a traffic stop pursuant to *Mimms*, or what amount of force a police officer can use to effectuate a

custodial arrest when the suspect refuses to exit the vehicle. It is precisely this type of case for which the Courts created the doctrine of qualified immunity.

2. Probable Cause

Respondent states, "The arguments brought by Petitioner Marcantel as the basis for his writ application discuss only Marcantel's side of the story" (*See* Brief in Opposition at pg. 11). This statement displays a fundamental misunderstanding and misapplication of the standard of probable cause utilized by law enforcement officers in the course of their daily work. Probable cause exists when:

> the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

Brinegar v. United States, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 93 L.Ed 1879 (1949). "To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, *viewed from the standpoint of an objectively reasonable police officer amount to' probable cause.*" *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003).

In determining the existence vel non of probable cause, the Court is concerned with the "facts and circumstances within the arresting officer's knowledge,

and of which he has reasonably trustworthy information." *State v. Johnson*, 249 La. 950, 192 So.2d 135, 141 (La. 1966), *cert. denied*, 388 U.S. 923, 87 S.Ct. 2144, 18 L.Ed.2d 1374 (1967). It is not particularly significant that the officer received information that was not firsthand; what is important is the nature of the information, whether it was such that "reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 157, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). Thus, observations and reports of fellow peace officers engaged in related investigations clearly provide a reliable basis for an arrest. Cf. *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965).

Thus, would an objectively reasonable police officer with the facts as known to Chief Marcantel on August 5, 2006 have believed that Respondent had committed a crime? The answer is clearly — yes. The Fifth Circuit found that Marcantel reasonably relied on information provided to him by Tarver. (*See* Appendix "A" to Petition at pg. 15a). This finding, coupled with the observations of Chief Marcantel at the scene were "facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Brinegar*, 338 U.S. at 175-176. The facts and circumstances as Chief Marcantel perceived them are the crux of the probable cause determination and for all of Chief Marcantel's actions taken thereunder. It does not matter what Petitioner alleges occurred — that is not the probable cause standard. What the officer perceived is all important to

the analysis. Chief Marcantel only needed ". . . a reasonable ground for belief of guilt." *Maryland v. Pringle*, 540 U.S. at 371. Respondents offer no credible argument Chief Marcantel did not have probable cause, other than "his writ application discusses only Marcantel's side of the story." (*See* Brief in Opposition at pg. 11). Petitioner correctly focuses on the facts as perceived by Chief Marcantel. As show above, this is not a credible argument against probable cause. Since Chief Marcantel had probable cause to arrest Respondent on August 5, 2005, Chief Marcantel was objectively reasonable and did not violate any clearly established right of Respondent.

B. Additionally or in the alternative, at the time this detention and arrest occurred, Respondent could not forcibly resist an unlawful detention under State Law

On August 5, 2005, the date of the incident at issue, Louisiana jurisprudence specifically precluded the right of a citizen to resist a detention that was not lawful. *See State of Louisiana v. Sims*, 2002-2208 (La. 6/27/03) 851 So.2d 1039, 1047. Even if the detention of Respondent by Officer Tarver was illegal, as Respondent alleges and the Fifth Circuit incorrectly held, Respondent still had no legal right to resist that detention. *Id.* The Court in *Sims, supra* recognized the long standing doctrine of an individual's lawful right to resist an unlawful arrest. *Id.* at 1045. Respondent could not lawfully resist her detainment by Officer Tarver, notwithstanding the fact the initial detainment was lawful. It must be pointed out to the Court that the Louisiana Legislature overruled *Sims, supra.* in 2006,

a year after the incident at issue. *See State v. Manual*, 2006-0486 (La. App. 4th Cir. 11/21/06), 946 So.2d 245, and 2006 La. Sess. Law Serv. Act 132 (Amending and reenacting La. R.S. 14:108 — Resisting and Officer). Nevertheless, at the time of this incident, Respondent did not have the right to resist her detention in Louisiana. The Fifth Circuit was incorrect when it found ". . . any resistance by Deville was lawful. . . ." (*See* Appendix to Petition at pg. 11a). On August 5, 2006, once Respondent was detained, she could not lawfully resist the detainment in Louisiana. She only had the right to resist an unlawful arrest. Since Chief Marcantel and Officer Tarver had probable cause (albeit developed independently and on different facts), Respondent could not afford herself of the right of resistance to an unlawful arrest, either. The jurisprudence in force on the day of the incident at issue shows the right allegedly violated was not ". . . defined at the appropriate level of specificity . . ." *Wilson v. Layne*, 526 U.S. at 615. Thus, the Fifth Circuit was incorrect when it held Petitioner violated a clearly established right. The Writ Petition should be granted.

C. The Fifth Circuit Decision impermissibly overrules *Mimms*

This Court in *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), held that the police have the authority under the Fourth Amendment to order the driver out of a vehicle during the course of a lawful detention for a traffic violation. The Louisiana Supreme Court in *State v. Benoit*, 2001-2712 (La.5/14/02), 817 So.2d 11, 15, has adopted *Mimms, supra.*

Respondent alleges that since none of the facts regarding the reason for the stop in *Mimms* were in dispute, Petitioner cannot rely on *Mimms*, and that the Fifth Circuit decision is not in conflict. Respondent forgets that officer Tarver had radar evidence of a violation of speed which justified his stop which he reported to Chief Marcantel. *Mimms* provided a bright line rule which allows an officer to compel a driver out of a vehicle on a lawful traffic stop. This bright line rule was based in large part on officer safety. For thirty-three years, law enforcement officers have been taught that they can compel a driver out of the vehicle when on a traffic stop. The officer safety issue becomes a moot protection if the police can not use force to extract a non-compliant driver. Despite what Respondent says, the Fifth Circuit's ruling, in essence, has impermissibly overruled *Mimms* and its progeny. Tarver utilized his radar gun to establish Respondent was speeding. This alone provides probable cause, and reasonable suspicion, that a crime or an offense was being or had been committed. It does not matter what Respondent says, the probable cause and reasonable suspicion determination is based on the *officer's perception of the facts*. *Maryland v. Pringle*, 540 U.S. at 371. Respondent's proper course of action was to contest the offense in a court of law, not on the side of the road!

The law of the Fifth Circuit has now overruled this Honorable Court in *Mimms* and now allows a driver who has been pulled over for a traffic violation to sit in the car and say "I did not do it, you have no probable cause or reasonable suspicion to do anything — and if you do — you have violated my clearly established right." Taking Respondent's argument to its logical conclusion

would justify driving off or physical resistance. It is important to remember the Chief was injured in this case by Mrs. Deville throwing a phone at him. The right to compel a suspect out of a vehicle on a traffic stop does not exist without the corresponding right to use force to compel compliance. In this matter, once Chief Marcantel developed reasonable suspicion, he could lawfully force Respondent from the vehicle. The fact Chief Marcantel had probable cause for an arrest gave him authority to break the window as well. Jurisprudential consistency and effective law enforcement application of this Court's criminal procedure warrant a grant of *certiorari*.

III. CONCLUSION

Given the qualified immunity and probable cause jurisprudence of this Court, *certiorari* review should be granted. The clear disregard for qualified immunity and probable cause jurisprudence by the Fifth Circuit cries out for correction. Additionally, law enforcement officials who face this type of situation across the nation on a daily basis need this Court's guidance on these fundamental issues of criminal procedure, public policy, and officer safety.

Respectfully submitted,

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